No. 2401

United States
Circuit Court of Appeals
For the Ninth Circuit.

S. G. HARVEY,

Appellant and Plaintiff in Error,

vs.

B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,

Appellee and Defendant in Error.

Transcript of Record.

Upon Appeal from and Writ of Error to the United States District Court for the Northern District of California, First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States, in and for the Northern District of California, Division Number One.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy, of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Amended Praecipe for Transcript on Appeal and Writ of Error.

To the Clerk of Said Court:

SIR: Please make up, print and issue in the above-entitled cause a certified transcript of the record, upon an appeal, and upon a writ of error, both allowed in this cause, to the Circuit Court of Appeals of the United States, for the Ninth Circuit, sitting at San Francisco, California, the said transcript to include the following:

Complaint of plaintiff.

Summons.

Order to show cause and temporary restraining order.

Answer of defendant S. G. Harvey.

Disclaimer of J. Downey Harvey. [1*]

Opinion of De Haven, District Judge, upon the issuance of temporary injunction.

*Page-number appearing at foot of page of original certified Record.

Minute order made February 29, 1912, granting injunction *pendente lite.*

Opinion of the Court (Farrington, J.).

Findings of fact and conclusions of law.

Decree.

Petition for allowance of appeal and order endorsed thereon.

Assignment of errors on appeal.

Statement of evidence on appeal, with stipulation of parties and approval of Judge as annexed thereto.

Citation on appeal.

Petition for writ of error and order of allowance endorsed thereon.

Assignment of errors on writ of error.

Writ of error.

Citation on writ of error.

Bond on appeal and writ of error, filed or to be filed, in accordance with order increasing amount of bond, made December 11th, 1913.

Amended praecipe for transcript.

Stipulation for single transcript on appeal and writ of error, dated December 8, 1913, with order of allowance by Circuit Court of Appeals endorsed thereon.

Order extending time to file record and docket cause.

All of the above to be included in a single transcript prepared in accordance with the stipulation last mentioned and the order of the Circuit Court of Appeals endorsed thereon, and to be certified under the hand of the clerk and the seal of the Court. [2]

You will also please transmit to the said Circuit

Court of Appeals, with the record to be prepared as above, original citations on appeal and on writ of error.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys and Solicitors for Defendant and Appellant and Plaintiff in Error, S. G. Harvey.

[Endorsed]: Filed Mar. 30, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [3]

In the District Court of the United States, in and for the Northern District of California, Division No. One.

B. S. STOWE, Trustee of Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE, JANE BLACK,
Defendants.

Complaint to Set Aside Fraudulent Conveyance.

Now comes plaintiff and complains and alleges:

I.

That on the 2d day of November, 1910, certain creditors of J. Downey Harvey filed a petition in the above-entitled Court, praying that said J. Downey Harvey be adjudicated bankrupt, and that an order to show cause, directed to said J. Downey Harvey, was issued by said Court upon said petition, and that said order to show cause was thereafter duly served

upon said J. Downey Harvey and, in response thereto, he appeared and pleaded to said petition, and, after due proceedings had, he was, by an order and judgment of said Court duly given and made, duly and regularly adjudicated bankrupt, and the matter of his bankruptcy duly referred to Hon. A. B. Kreft, a duly and regularly appointed, qualified and acting Referee in Bankruptcy of the above-entitled court, for [4] further proceedings. That thereafter a meeting of the creditors of said J. Downey Harvey was called upon due and proper notice thereof, duly and regularly given, and that said meeting of creditors was regularly continued by the consent of all parties appearing thereat, until the 17th day of November, 1911, at the hour of 2 o'clock P. M. on that day, and that thereupon B. S. Stowe was duly and regularly elected Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, and his bond as Trustee fixed in the sum of Five Thousand Dollars, and that thereupon said B. S. Stowe duly gave bond as required and took his oath of office, and that said Hon. A. B. Kreft did, on the 20th day of November, 1911, duly make his order approving said bond, and that ever since said time said B. S. Stowe has been and is now, the duly elected, qualified and acting Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt.

II.

That on the 26th day of November, 1909, J. Downey Harvey was the owner of five hundred and forty-six (546) shares of the capital stock of the Shore Line Investment Company, a corporation,

duly incorporated under and by virtue of the laws of the State of California, and that said shares of stock were at said time, ever since have been and now are of the value of One Hundred Nine Thousand Two Hundred ($109,200.00) Dollars and upwards, and that since said date dividends have been regularly paid and collected upon said stock in the sum of Eleven Thousand Four Hundred and Eighty-six ($11,486.00) Dollars.

III.

That on said 26th day of November, 1909, said J. Downey [5] Harvey gave to S. G. Harvey the above-described property and all of it and transferred to her all of said property. That said transfer was made wholly without consideration of any kind or character and that said S. G. Harvey did not confer or agree to confer any benefit whatever upon said J. Downey Harvey for the transfer of said property, or any of it, to her, nor did any other person, for or on behalf of said S. G. Harvey, confer or agree to confer any benefit whatever upon said J. Downey Harvey therefor. That said S. G. Harvey did not suffer any prejudice nor agree to suffer any prejudice, nor did any person whatsoever for her or on her behalf, suffer or agree to suffer any prejudice, for the transfer of said property or any part of it to said S. G. Harvey, but that said transfer was made by J. Downey Harvey to S. G. Harvey wholly without consideration of any kind, nature or form, and was purely voluntary.

IV.

That J. Downey Harvey was, on the 26th day of

November, 1909, wholly insolvent, and was unable to pay his debts, from his own means as they became due, and that all his assets, taken at a fair valuation, and all his property, taken at a fair valuation, was insufficient in amount to pay his just debts and liabilities. That said J. Downey Harvey was insolvent, as above set out, long prior to said 26th day of November, 1909, and that he ever since has been and now is insolvent. That S. G. Harvey knew, on the 26th day of November, 1909, and at the time of the transfer hereinabove described, well knew that said J. Downey Harvey was insolvent, and that said S. G. Harvey has at said times, knowledge of the financial condition of said J. Downey Harvey and knew that he was for a [6] long time prior to said date wholly unable to pay his debts, from his own means, as they became due and that the aggregate of his assets, taken at a fair valuation, were insufficient in amount to pay his just debts and liabilities.

V.

That the names of the defendants designated as John Doe, Richard Roe and Jane Black are and each of them is, unknown to plaintiff, and that the names so used to designate said defendants are fictitious, and plaintiff prays that he may be permitted to amend this complaint and all proceedings herein, by substituting the true names of said defendants for said fictitious names when he discovers the same. That said defendants, and each of them, claim some title to, interest in or lien upon the property herein described, but that said title, interest or lien, and

each of them is, subordinate to the title of plaintiff and subject to the claim herein set out.

VI.

That said S. G. Harvey threatens to, and will, unless restrained by the order of this Court, transfer the property described herein to some person who can claim to be a *bona fide* purchaser for value, and that the effect of such transfer, if made, would be to render said S. G. Harvey unable to respond to the judgment which may be rendered herein, and to make her wholly insolvent, and to deprive this plaintiff of all beneficial interest of every kind, character and form, in and to the above-described property.

VII.

That the transfer hereinabove mentioned was made by J. Downey Harvey to S. G. Harvey by delivering to her certain [7] certificates of the capital stock of said Shore Line Investment Company made out in the name of said J. Downey Harvey and certifying that he was the owner of 546 shares of the capital stock of said company. That when said certificates were delivered they were endorsed by said J. Downey Harvey so as to enable them to be transferred on the books of said company, and that they were thereupon presented to the proper officers of said company, and said certificates, so delivered, were cancelled and new certificates were thereupon issued by said company to said S. G. Harvey, certifying that she was the owner of said 546 shares of the capital stock of the Shore Line Investment Company.

VIII.

That at the time of the transfer hereinabove mentioned said J. Downey Harvey was largely indebted, in the sum of upwards of Two Hundred Thousand ($200,000.00) Dollars to divers unsecured creditors who at said time were, ever since have been and now are, creditors of said J. Downey Harvey holding just and valid claims and debts against him, and that said indebtedness, and no part thereof, has ever been paid by said J. Downey Harvey, or any person whomsoever in his behalf, but that it, and the whole thereof, is and at all the times herein mentioned was, wholly due, owing and unpaid.

IX.

That all the creditors above named are represented by plaintiff in his capacity as Trustee of the estate of J. Downey Harvey, a bankrupt, and that plaintiff is now, and was, ever since the 20th day of November, 1911, the Trustee for all of said creditors. That all the assets and property of said J. Downey Harvey and of his estate in bankruptcy, are insufficient [8] to pay the creditors thereof, holding just and valid debts, the amount of their claims or anything more than two per cent of the amount thereof, and that said creditors, and all of them, and this plaintiff are greatly damaged by the aforesaid transfer, and are unjustly deprived of the value of the property so transferred.

X.

That said transfer, made as aforesaid, by J. Downey Harvey to S. G. Harvey, was made by him with the intent to delay and defraud the said creditors of

said J. Downey Harvey of their demands and that said transfer was accepted and taken by said S. G. Harvey with the intent and purpose to delay and defraud said creditors of their demands. That said transfer is fraudulent and void as to this plaintiff.

WHEREFORE, plaintiff prays, that said transfer be set aside, annulled and cancelled, and that it be adjudged and decreed to be utterly null and void, and that it be adjudged and decreed that plaintiff is the owner of all of said property, and that said defendants, and all of them, be enjoined and restrained from making any conveyance of said property, or any of it, or from collecting any dividends thereon, or from making or causing to be made any transfer of said property, or any of it, and that the claims of defendants, and all of them, to said property be adjudged to be subject to and subordinate to the title of plaintiff to said property; and that plaintiff recover his costs herein, and for such other and further relief as may be meet and equitable in the premises.

SCHLESINGER & SHAW,
EDWIN H. WILLIAMS,
Attorneys for Plaintiff. [9]

State of California,
City and County of San Francisco,—ss.

B. S. Stowe, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are

therein stated on his information or belief, and that as to those matters he believes it to be true.

[Seal] B. S. STOWE.

Subscribed and sworn to before me this 11th day of January, 1912.

A. J. HENRY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 11, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [10]

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

B. S. STOWE, Trustee in Bankrupcty of the Estate of J. DOWNEY HARVEY, a Bankrupt,

Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE et al.

Defendants.

Summons.

Action brought in said Court, and the Complaint filed in the office of the Clerk of said District Court in the City and County of San Francisco.

The President of the United States of America, Greeting: To J. Downey Harvey, S. G. Harvey, John Doe et al., Defendants.

You are hereby directed to appear and answer the Complaint in an action entitled as above, brought

against you in the District Court of the United States, in and for the Northern District of California, within ten days after the service on you of this Summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the Complaint.

WITNESS the Honorable JOHN J. DE HAVEN, Judge of said District Court, this 11th day of January, in the year of our Lord one thousand nine hundred twelve, and of our Independence the one hundred and thirty sixth.

[Seal] JAS. P. BROWN,
Clerk.
By M. T. Scott,
Deputy Clerk. [11]

United States Marshal's Office,
Northern District of California.

I hereby certify, that I received the within writ on the 11th day of January, 1912, and personally served the same on the 11th day of January, 1912, upon J. Downey Harvey and S. G. Harvey, by delivering to and leaving with each of said J. Downey Harvey and S. G. Harvey, said defendants named therein personally, at the City and County of San Francisco, in said District, a certified copy thereof, together with a

copy of the Complaint certified to by ..... attached thereto.

C. T. ELLIOTT,
U. S. Marshal.
By Elmo Warner,
Office Deputy.

San Francisco, Jan. 12, 1912.

[Endorsed]: Filed Jan. 15, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [12]

In the District Court of the United States, in and for the Northern District of California, Division Number One.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Order to Show Cause and Temporary Restraining Order.

Upon reading and filing the verified complaint of plaintiff and good cause appearing therefrom;

IT IS HEREBY ORDERED that defendants herein, J. Downey Harvey and S. G. Harvey, appear before the above-entitled court, Division Number One thereof, at its courtroom in the United States Postoffice Building, Seventh and Mission Street, San Francisco, California, on Monday,

the 29th day of January, 1912, at the hour of 10 o'clock A. M. on that day, and there and then show cause, if any they have, why the above-entitled court should not issue a temporary injunction restraining said defendants and each of them, their agents, attorneys and servants, from transferring, assigning, hypothecating or pledging, or in any manner encumbering five hundred forty-six shares of the capital stock of the Shore Line Investment Company, a corporation, standing in the name of S. G. Harvey on the books of said corporation, or collecting or attempting to collect any dividends whatever upon said shares of stock or any part thereof.

And pending the hearing and determination of the foregoing order to show cause, IT IS FURTHER ORDERED that said defendants and each of them be, and they and each of them hereby are, restrained [13] and prohibited from transferring, assigning, hypothecating or pledging, or in any manner encumbering said shares of stock, or any part or portion thereof, either by themselves, their agents, attorneys or servants, and are further restrained and prohibited from collecting any dividends whatever upon said shares of stock or any part thereof.

Done in open court, January 19th, 1912.

R. S. BEAN,
Judge.

[Endorsed]: Filed Jan. 19, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [14]

In the District Court of the United States, in and for the Northern District of California, Division No. 1.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY et al.,
Defendants.

Answer of S. G. Harvey (etc.).

Comes now S. G. Harvey, one of the defendants in the above-entitled action, and answering plaintiff's complaint herein, admits, denies, avers and alleges as follows:

I.

This defendant denies that on the 26th day of November, 1909, or at any time since the year 1905, J. Downey Harvey was, or has been, the owner of five hundred and forty-six (546) shares, or of any of the shares whatsoever, of the capital stock of the Shore Line Investment Company, mentioned in plaintiff's complaint.

This defendant denies that any five hundred forty-six (546) shares of the capital stock of the said Shore Line Investment Company ever have been, or now are, of the value of $109,200 and upwards, or of any other sum in excess of $50,000.

This defendant denies that any dividends have ever at any time been paid upon five hundred forty-

six (546) shares, or upon any shares, of the capital stock of said Shore Line [15] Investment Company owned by J. Downey Harvey at the time such dividends were paid.

II.

This defendant denies that on the 26th day of November, 1909, or at any time subsequent to the year 1905, the said J. Downey Harvey gave to this defendant, S. G. Harvey, the said, or any, five hundred forty-six (546) shares of the Shore Line Investment Company stock, or any part or portion thereof, or any dividend or dividends thereon, or that he, at any time subsequent to the said year 1905, transferred to this defendant all or any part or portion of the said stock, or any dividend or dividends thereon.

This defendant further denies that the said J. Downey Harvey ever, at any time, made to her any transfer of any shares of the capital stock of the Shore Line Investment Company at a time when the said J. Downey Harvey was insolvent.

This defendant avers that at all times in the year 1905 the said J. Downey Harvey was solvent, and was able to pay his debts from his own means as they became due, and that all his assets, taken at a fair valuation, and all his property, taken at a fair valuation, was sufficient in amount to pay his just debts and liabilities.

That while so solvent, as aforesaid, the said J. Downey Harvey, on or about the 26th day of June, 1905, acquired 300 shares of the capital stock of the said Shore Line Investment Company, and forthwith upon the issuance of a certificate therefor to him, he

duly endorsed such certificate, by writing his name upon the back thereof, and, on or about said 26th day of June, 1905, he delivered and gave the said certificate, and said shares represented thereby, to this defendant, who was at said time, ever since has been, and now is, his lawful wife. [16]

That while so solvent as aforesaid, the said J. Downey Harvey, on or about the 29th day of August, 1905, acquired 66 shares of the capital stock of the said Shore Line Investment Company, and forthwith upon the issuance of a certificate therefor to him, he duly endorsed such certificate, by writing his name upon the back thereof, and on or about the said 29th day of August, 1905, he delivered and gave the said certificate and said shares represented thereby, to this defendant, who was at said time, ever since has been, and now is, his lawful wife.

That while so solvent, as aforesaid, the said J. Downey Harvey, on or about the 25th day of September, 1905, acquired 180 shares of the capital stock of said Shore Line Investment Company, and forthwith upon the issuance of certificates therefor to him, he duly endorsed such certificates, by writing his name upon the back of each thereof, and on or about the said 25th day of September, 1905, he delivered and gave the said certificates, and each of them, and the said shares represented thereby, to this defendant, who was at said time, ever since has been, and now is, his lawful wife.

That said respective deliveries of said shares and certificates were made in consideration of the natural love and affection which the said J. Downey Har-

vey bore to this defendant, and were made with the intent to pass the absolute title to the said shares of stock to this defendant, and of making gifts thereof to her. That this defendant then and there, at the respective times of said deliveries, accepted said gifts of the said shares and received into her possession said stock certificates evidencing the same, and ever since has been the owner and holder thereof.

That on or about the 26th day of November, 1909, this defendant caused said shares to be transferred into her name [17] upon the books of the said Shore Line Investment Company. That a new certificate therefor was thereupon issued to her in her name, and was thereupon forthwith delivered to her by said Shore Line Investment Company, and she ever since has continued to be and now is the owner and holder thereof, and in the possession thereof.

III.

That no dividends had ever been declared upon the said stock prior to the said 26th day of November, 1909, but that since the said 26th day of November, 1909, divers dividends thereon have been declared, all of which said dividends, amounting in the aggregate to $11,486.00, have been paid to *this* defendants.

IV.

This defendant admits that the transfer so made to her by the said J. Downey Harvey was made by delivering to her certain certificates of the capital stock of the Shore Line Investment Company, made out in the name of J. Downey Harvey, certifying that he was the owner of shares of the capital stock of said Shore Line Investment Company,

amounting in the aggregate to five hundred forty-six (546) shares, and that when said certificates were delivered, they were endorsed by the said J. Downey Harvey so as to enable them to be transferred on the books of said Shore Line Investment Company, but this defendant denies that said transfer of said shares of stock, or any part or portion thereof, by the said J. Downey Harvey to her was made on the 26th day of November, 1909, or at any time later than the year 1905.

V.

This defendant has no information or belief on the subject sufficient to enable her to answer the allegations that the said J. Downey Harvey was, long prior to the 26th day of [18] November, 1909, insolvent, as set out in Paragraph IV of plaintiff's complaint herein, and, basing her denial on that ground, this defendant denies that the said J. Downey Harvey was long, or at any time, prior to the 26th day of November, 1909, insolvent, as alleged, or that he was insolvent on said 26th day of November, 1909.

This defendant denies, upon and according to her information and belief, that the said J. Downey Harvey was insolvent at any time in the year 1908, or at any time prior thereto.

VI.

This defendant has no information or belief sufficient to enable her to answer the allegation of plaintiff that the defendants sued by fictitious names herein claim some title to, interest in, or lien upon, the property herein described, and, basing her denial on that ground, this defendant denies that the

defendants designated in said complaint as John Doe, Richard Roe, and Jane Black, or any or either of them, claim some or any title to, interest in, or lien upon the shares of stock described in plaintiff's complaint.

This defendant denies that said defendants so sued by fictitious names herein, or any or either of them, have or has any title to, interest in, or lien upon the property described in plaintiff's complaint, or that said, or any, title, interest, and lien, or title or interest or lien, is subordinate to the title of plaintiff, or that plaintiff has any title to, interest in, or lien upon the said shares of stock, or any part or portion thereof.

VII.

This defendant denies that she has threatened to, or that she will unless restrained by the order of this Court, transfer the property described in plaintiff's complaint, or any stock in the Shore Line Investment Company held by her, to some [19] person who can claim to be a *bona fide* purchaser for value, or to any person at all, and in this behalf this defendant avers that she has no present intention to sell or dispose of her said shares of stock.

VIII.

This defendant further denies that the effect of any transfer which she might make of the said stock would be to render her unable to respond to any judgment which might be rendered herein, or to make her wholly or at all insolvent, or to deprive plaintiff of all or any beneficial interest whatever in or to the property described in plaintiff's complaint.

IX.

Answering the allegations of paragraph VIII of the said complaint, this defendant denies that any transfer was made to her of the said five hundred forty-six (546) shares, or of any shares, of stock of the Shore Line Investment Company by the said J. Downey Harvey at any time subsequent to the year 1905.

This defendant denies that in the year 1905, at the time that the said gift was made to her as aforesaid, said J. Downey Harvey was at all in debt.

X.

Answering the allegations of paragraph X of said complaint, this defendant denies that any transfer of any stock in the Shore Line Investment Company was made to her on the 26th day of November, 1909, by the said J. Downey Harvey, or at any time subsequent to the year 1905.

XI.

This defendant denies that any transfer ever made to her by the said J. Downey Harvey of any shares of stock of the Shore Line Investment Company was made by him with the intent and purpose, or intent or purpose, to delay and defraud, or to delay or defraud, the alleged, or any, creditors of the said [20] J. Downey Harvey, of their or any of their demands, or of any demand, or that any transfer of shares of stock of the said Shore Line Investment Company from the said J. Downey Harvey to this defendant was ever at any time accepted and taken, or accepted or taken, by this defendant with the intent and purpose, or with the intent or purpose, to delay and de-

fraud, or to delay or defraud, said or any creditors of their demands, or that any transfer made to this defendant by the said J. Downey Harvey of any shares of stock in the said Shore Line Investment Company was fraudulent and void, or fraudulent or void, as to the plaintiff, or any other person or persons.

WHEREFORE, this defendant prays that plaintiff take nothing by his said complaint, and that she be hence dismissed with her costs of suit.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for S. G. Harvey. [21]

State of California,
City and County of San Francisco,—ss.

S. G. Harvey, being duly sworn, deposes and says: That she is one of the defendants in the above-entitled action; that she has read the foregoing answer and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief, and as to those matters that she believes it to be true.

S. G. HARVEY.

Subscribed and sworn to before me this 30th day of January, 1912.

[Seal] ALICE SPENCER,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Receipt of a copy of the within An-

swer, this 19th day of February, 1912, is hereby admitted.

SCHLESINGER & SHAW,
E. H. WILLIAMS,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 19, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. **[22]**

In the District Court of the United States, in and for the Northern District of California, Division No. 1.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY et al.,
Defendants.

Stipulation [That Copy of Answer may be Filed in Place of Original Answer].

The original answer of the defendant, S. G. Harvey, in the above-entitled cause, having been apparently misplaced in the office of the Clerk of the above-entitled court, in connection with making up the record on appeal in said cause;

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action, and their respective attorneys undersigned, that the foregoing copy of the answer of S. G. Harvey, originally filed in the cause, is a full, true and correct copy of the

same and the endorsements thereon, and the said copy may be filed in the office of the Clerk of the court in place of the original, and with the same force and effect as the original answer.

Dated April 3, 1914.

SCHLESINGER & SHAW,
E. H. WILLIAMS,
Attorneys for Plaintiff.
CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Defendant. **[23]**

[Endorsed]: Filed Apr. 3, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. **[24]**

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Thursday, the 29th day of February, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 15,222.

B. S. STOWE, etc.,

vs.

J. DOWNEY HARVEY et al.

Order Granting Injunction Pendente Lite.

The hearing on the order to show cause issued herein against defendants, why an injunction *pendente lite* should not issue enjoining the sale or incumbering of 546 shares of the capital stock of the

Shore Line Investment Company, standing in the name of S. H. Harvey, or the collections of dividends thereon, this day came on for hearing, A. E. Shaw, Esqr., appearing for plaintiff and Charles S. Wheeler, Esqr., for respondent, and after hearing affidavits read and arguments of respective counsel, by the Court ordered that the application for said injunction be, and the same is hereby submitted to the Court for determination, and thereupon, after due consideration had, the Court filed its memorandum opinion, and by the Court ordered that said application be, and the same is hereby granted. **[25]**

In the District Court of the United States, for the Northern District of California, First Division.

No. 15,222.

B. S. STOWE, Trustee, etc.,

Plaintiff,

vs.

J. DOWNEY HARVEY et als.,

Defendants.

Memorandum Opinion—De Haven, District Judge.

DE HAVEN, District Judge.

This is an application for an injunction *pendente lite.* In the case of Southern Pacific Co. et al. vs. Earl, 82 Fed. 690, the Circuit Court of Appeals for this district said:

> "The order for such an injunction does not finally determine the rights of the parties to the action, and its only purpose and effect are to

preserve the existing state of things until the case has been fully heard by the Court, and the entry of a final decree therein. And it is equally well settled that the granting of a provisional injunction rests in the sound discretion of the trial court, and that it is not necessary that the Court should, before granting it, be satisfied from the evidence before it that the plaintiff will certainly prevail upon the final hearing of the cause. On the contrary, to adopt the language of the Court in Georgia vs. Brailsford, *a Dal.* 402, 'a probable right, [26] and a probable danger that such right would be defeated without the special interposition of the Court,' is all that need be shown as the basis for such an order."

* * * * * * * *

"If there was before the Court evidence having a reasonable tendency to make out a *prima facie* case for the plaintiff, the order granting the injunction will generally be affirmed, notwithstanding there may have been a material conflict in the evidence submitted to the Court at the time of making its order."

There is certainly a very material conflict in the affidavits filed upon the present hearing, and I do not now express any opinion as to the weight to be accorded the several affidavits or as to the merits of the controversy raised by the bill of complaint and the answers thereto. It is sufficient to say that under the rule stated in the case of Southern Pacific Co. vs. Earl, above quoted, I deem it a proper exer-

cise of discretion to grant the preliminary injunction asked for in order that the existing state of things may be preserved until such time as the case shall have been fully heard before the Court and a final conclusion reached as to the matters in issue.

[Endorsed]: Filed Feb. 29, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. **[27]**

In the District Court of the United States in and for the Northern District of California, Division No. One.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Disclaimer of Defendant J. Downey Harvey.

Comes now J. Downey Harvey, one of the defendants in the above-entitled action, and disclaims any interest of any kind whatsoever in any of the shares of the capital stock of Shore Line Investment Company, mentioned in the complaint in the above-entitled action.

COOPER, GRAY & COOPER,
GRAY & COOPER,
Attorneys for Defendant J. Downey Harvey.

Received copy of within this 13th day of March, 1912.

SCHLESINGER & SHAW,
EDWIN H. WILLIAMS,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 13, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. **[28]**

In the District Court of the United States, in and for the Northern District of California.

B. S. STOWE, Trustee, etc.,

Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY et al.,

Defendants.

Opinion—Farrington, District Judge.

EDWIN H. WILLIAMS, SCHLESINGER & SHAW, for Plaintiff.

CHARLES S. WHEELER and JOHN F. BOWIE, for Defendant, Sophie G. Harvey.

FARRINGTON, District Judge.

A petition was filed in this court November 2d, 1910, by certain creditors of J. Downey Harvey, praying that he be adjudged bankrupt, and in due course such an adjudication was made. This suit is brought by B. S. Stowe, the trustee in bankruptcy, against said bankrupt and his wife Sophie G. Harvey, to procure a decree that plaintiff is the owner of 546 shares of the capital stock of the Shore Line Investment Company, alleged to have been fraudu-

lently transferred by said Harvey to his wife.

The allegations of the complaint are that on the 26th day of November, 1909, J. Downey Harvey, being then the owner of said stock, which was of the value of $109,200, transferred and delivered the same to his wife without any consideration whatever; that at the time all his property taken at a fair valuation, was insufficient to pay his just debts; and that S. G. [29] Harvey then knew that her husband had been insolvent for a long time prior to said transfer.

It is admitted that the value of the stock is $50,000; that on the 26th day of November, 1909, it was transferred into the name of Sophie G. Harvey on the books of the corporation; but it is claimed that the actual gift to Mrs. Harvey occurred in 1905, and that the stock certificates had been in her exclusive possession for more than four years prior to actual transfer on the corporate books.

Defendants aver that about June 26th, 1905, Harvey acquired 300 shares of this stock, which he then transferred to his wife by endorsing the certificate, and delivering it to her. About August 29th, 1905, he acquired 66 shares, which he then transferred to his wife by endorsing the same in blank, and delivering the certificate; and about September 25th, 1905, he acquired 180 shares, which he transferred in the same manner to his wife; that at all these times he was solvent; and that the said Sophie G. Harvey at the respective times of said deliveries accepted said gifts of stock, and received the certificates into her possession.

It is admitted that Sophie G. Harvey since November 26th, 1909, has received in dividends on this stock $11,486. It is alleged in the bill, and not denied in the answer, that Harvey on that date was indebted in the sum of $200,000 to divers unsecured creditors, who are still unpaid, and that all the assets of his estate in bankruptcy are insufficient to pay more than 2 per cent of their claims. Mr. Harvey testifies that he is indebted to no one who was his creditor in 1905. This is not disputed.

The principal question is, when did the stock certificates [30] come into the possession of Mrs. Harvey? Her counsel in the course of the trial said, "We make no claim as to that stock unless it was given to Mrs. Harvey in 1905."

Under Section 3440 of the Civil Code of California, unless the gift of Mrs. Harvey was accompanied by an immediate delivery, and followed by an actual and continuous change of possession of the stock certificates, it will be conclusively presumed to be fraudulent, and therefore void against those who were his creditors while he was in possession. No case has been called to my attention, nor have I been able to discover one in which it is held that the possession of a stock certificate, endorsed in blank but not transferred on the books of the company, is not possession within the meaning of the section of the Code referred to. Consequently, if it be assumed or established, that the stock certificates in question, endorsed in blank, were actually given to Mrs. Harvey in 1905, and continuously retained in her custody and possession until November, 1909, when for the

first time there was a transfer to her on the books of the corporation, I shall hold that her possession constituted that actual and continuous change of possession of the stock itself, which avoids the code provision referred to.

Mr. Harvey testifies that he purchased this stock with his own money, and it is admitted there was no other consideration for the transfer to Mrs. Harvey than love and affection. He kept a set of private books in which were recorded, among other matters, transactions with his wife. These books are in evidence, and show the stock in question to have been his up to November 26th, 1909; prior to that date no mention was made in the books of any transfer or gift of this stock to his wife in June, 1905. In the ledger there is an account of "Family [31] gifts and allowances." In this account are recorded a number of gifts made by Harvey to his wife long prior to 1909, but there is no record of any gift of the shares of stock in question. Some time in 1909 or 1910, Mr. Harvey's bookkeeper Crosby wrote in the ledger, referring to the Shore Line Investment Company stock, "This is the property of Mrs. H., and belongs to her." The journal contained no entry in regard to this stock until after November 26th, 1909. In the book of trial balances, in February, November and December, 1906, January, 1907, February and March, 1908, and October, 1909, this stock is carried as the property of Mr. Harvey. This trial balance book shows that it was listed in the year 1905 as Harvey's stock, and in each and every succeeding year continuously, until and including Octo-

ber 1, 1909. In the succeeding trial balance of March 31, 1910, the stock is dropped for the first time from the list of Harvey's assets.

Prior to November, 1909, the stock in question all stood on the books of the Investment Company in the name of Mr. Harvey. Each certificate was issued to him in his name, and paid for by him with his own money. By virtue of this apparent or actual ownership of the stock, he was president of the company after 1906. Prior to November 26th, 1909, when the certificates issued to Mr. Harvey were returned and cancelled, and new certificate issued in lieu thereof to Mrs. Harvey, Mr. Harvey seems to have exercised a control and dominion over the stock as complete and effectual as though it were his individual property. At various meetings of the stockholders of the company at which he was present, he represented 546 shares of stock in his own name. At the meeting of April 25th, 1907, he represented these 546 shares in his own name, and also 1692 shares by proxies [32] from fourteen several stockholders. As a stockholder he signed documents and resolutions of the company in which it was recited that the signers were owners and holders of certain shares of stock. The stock was carried in his private books of account—his journal, ledger and trial balance book—as his individual property.

Prior to November, 1909, there was not a suggestion in these books that the stock belonged to Mrs. Harvey. April 15th, 1907, Harvey paid an assessment of $10 per share, or $5,460, on this stock. This amount was not charged to Mrs. Harvey, though less

than two months before he had paid a $500 assessment on her Ocean Shore stock, with which she was debited. January 11th, 1907, he gave his wife $200 in cash; this also was charged against her. Mr. Harvey explains this circumstance by saying that he intended that $5,460 as a gift; but notwithstanding this intention, this very $5,460 appears among his assets in his trial balances for February, 1908, and March and October, 1909; and also in the statement of his affairs, which was prepared at his request by his bookkeeper September 22d, 1907. Mr. Harvey attempts to avoid the obvious inference from these entries by saying that his attention was entirely engrossed with the affairs of the Ocean Shore Railway Company; that he "seldom examined his ledger"; the bookkeepers kept the books as they saw fit; he was not in the habit of examining his trial balances —"I have no interest in them"; the purpose in maintaining bookkeepers was "to write up my books once in a while, look after them, and mostly my checkbook, which they took care of, and that I always had written up every month to know my condition." "Q. Did you examine your trial balances in 1906? A. I have no recollection of it. Q. Did you ever have occasion [33] to examine your trial balances during the years 1905, 1906, 1907, 1908, 1909 and 1910? A. I never knew of this book at all. Q. Did you ever examine the journal or ledger with respect to your Shore Line Investment Company stock? A. I never had occasion to. Q. Did you ever have occasion to look into your ledger during these years? A. Not in relation to the Shore Line Investment

Company's stock. Q. Did you ever have occasion to look into your ledger and journal with respect to your other investments? A. I might have; I don't remember of having looked them up."

It is hardly credible that Mr. Harvey should have been so indifferent as to the contents of his account-books. Mr. Wasserman, his bookkeeper prior to April, 1907, whose loyalty to Mr. Harvey is evident, says that he sometimes discussed entries in the books with Mr. Harvey; that it was Mr. Harvey's habit to give pencil memoranda in order that particular entries could be made, and that Mr. Harvey must have had knowledge of the entries in the trial balance book. Mr. Wasserman's statement, dated September 22d, 1907, is also a fact of significance bearing on Mr. Harvey's knowledge that in his books this stock was being carried as his asset, and not as the property of his wife. Mrs. Barron, a daughter of Mr. and Mrs. Harvey, testifying as to a conversation with her mother which occurred in 1907, shows that Mrs. Harvey worried very often at that time about the affairs of the Ocean Shore Railway Company, of which Mr. Harvey was president, and in which he had invested heavily. The nature and cause of the worry is revealed in the daughter's question, "I asked her if she didn't have anything of her own that would be very valuable." It was earlier in this same year, under date of September 22d, that Mr. Wasserman wrote Mr. Harvey thus: "In order to give you the statement you desire [34] with regards your affairs, have gone thoroughly over your accounts." Following this in the letter there is an itemized list

of Mr. Harvey's liabilities, amounting to $745,944.37; an itemized statement of his monthly interest charge, amounting to $3,320.29, and also of his average monthly income amounting to $3,950.95. Following this there is a list of his assets among which is the item "Santa Cruz Beach Company $4,000, less half given Mrs. Harvey, $2,000." The letter concludes thus:

"Besides the above you should take into consideration the following:

Due from Rogers for three assessments paid Ocean Shore Stock secured by Stock and bonds		$ 12,420.00
Ocean Shore Rwy. Co.—Cash put in not including assessment No. 3		283,613.17
Ocean Shore Bonds Given in payment Assessment No. 3		55,000.00
Shore Line Inv. Co.		23,610.00
Following Nevada Mining Ventures representing cash paid in:		
Forward		374,643.17
Ex. Bullfrog Banner	$5,000	
Midas Bullfrog	8,750	
Bullfrog Banner less 1/2 given S. H. G.	1,500	
		15,250.00
		$389,393.17

Assets on previous page	$993,394.30
" above	389,393.17
	$1,383,287.67

"Your liabilities are $745,943.37 and your assets the above amount which show very well on paper but the trouble is the assets are given at a fair valuation, but if turned into cash if it was absolutely necessary to meet your obligations they would not bring that figure, you know.

"I would advise a careful study of the above with a view of disposing of all your assets that you possibly can at a valuation a little in advance of the above if possible, and paying off the debts as fast as possible. For although the liabilities are only a trifle over half the assets the interest and income about balance.

"If the various small properties and even the bigger ones could be turned into cash and applied on the indebtedness, I think everything will turn out for the best.

"I forgot to mention the amount of $2,144.31 which the Ocean Shore owes you for expenses of Eastern trip when you tried to sell bonds last year.

"If you wish to see me about the above to-morrow please telephone me."

The Ocean Shore Railway Company, which was soon to go into the hands of a receiver, was evidently a cause of anxiety, both to the husband and the wife. At practically the same time the wife, fearful that her husband's fortune would be wrecked, was worrying about her own future, and he was demanding from his bookkeeper a statement of his affairs. Under such circumstancs it is unreasonable to suppose that he did not examine the statement with care when it was handed to him, and that he was not at the time fully apprised of the fact that the stock in ques-

tion was being carried on his books as his own property. If this stock actually belonged to Mrs. Harvey, [36] and the fact was known to Mr. Wasserman as well as to Mr. Harvey, why was it not excluded from the list of assets, as was the half interest in the Santa Cruz Beach Company, "given Mrs. H."?

Much stress is placed on Mr. Crosby's testimony that Mr. Harvey told him in the spring of 1907 the stock was Mrs. Harvey's. The weight to be given this testimony, as well as the weight which Mr. Crosby himself attributed to the statement made by Mr. Harvey, must be considered in connection with the fact that as Mr. Harvey's bookkeeper after April, 1907, he continued to include this very stock among Mr. Harvey's assets in the trial balances prepared by him, of February, 1908, and March and October, 1909. It was not until March, 1910, after the stock had actually been transferred to Mrs. Harvey on the books of the corporation, and after Mr. Harvey's insolvency was apparent, that Crosby entered on Mr. Harvey's books the statement that this stock had been purchased four years before for Mrs. Harvey.

Mr. Corbet testifies that he had a conversation with Mr. Harvey prior to the issuance of any stock in the Shore Line Investment Company, in which Mr. Harvey said he was buying the stock, and was giving it to Mrs. Harvey, and that after the stock was issued Mr. Harvey told him a number of times that the stock was given to Mrs. Harvey.

Charles W. Fay, general manager of the Shore Line Investment Company after January, 1906, testified that about the time he entered the employ of

the company, Mr. Harvey told him that the stock was Mrs. Harvey's, and that again in October and November, 1909, similar statements were made.

These declarations to the effect that the stock was Mrs. Harvey's are of little assistance in determining at what time the stock was actually delivered to her. The statements may [37] be entirely consistent with plaintiff's contention that the stock was not actually delivered until November 26th, 1909. The statements to Mr. Fay in October and November, 1909, were made within a few days, or weeks at most, of the time when the stock was transferred to Mrs. Harvey on the corporate books. Then Mr. Harvey was insolvent, and this fact was undoubtedly known to both husband and wife. His statement under such conditions may have been inspired by a desire to protect his wife. Certainly it is entitled to little weight in determining whether Mrs. Harvey had had control and exclusive possession of the stock certificates for the previous four years.

In Mr. Harvey's ledger there is an account entitled "Shore Line Investment Company," directly under this heading are the words "This stock was purchased for Mrs. Harvey and belongs to her." Testifying before the referee in December, 1911, Mr. Harvey said that this notation "was made when Mr. Crosby took charge of my books. I told him the conditions of the different properties when he got my books, and he made notations on it for that purpose." A few months later, in April, 1912, in testifying in this case, Mr. Harvey said, "It was made by Mr. Crosby. I should imagine it was made shortly after he took

charge of my books; as to that I could not say." "I should imagine it was when he came there, or whenever he called my attention to my books in any way." And in response to a question as to whether he told Mr. Crosby the condition of his properties when Mr. Crosby took charge of the books, Mr. Harvey replied, "I don't know whether I did or not. I suppose those things speak for themselves." Mr. Crosby, after considerable cross-examination, admitted that the entry was not made until March, 1910, more than three months after the actual transfer of the stock to Mrs. Harvey. Why he neglected to make the entries in Mr. Harvey's books, and why these [38] books until March, 1910, failed to contain any suggestion whatever that this stock, or any interest in it, had been transferred to Mrs. Harvey is difficult to understand, if he had been directed several years before, as he says, to make such a notation.

Mrs. Harvey's claim to the stock rests on her alleged possession of the certificates, beginning in 1905. If actual delivery did not occur until November 26th, 1909, when the stock was transferred to her on the books of the corporation, the defense fails. Her account of her acquisition of the certificates is far from satisfactory. On examination before the referee in bankruptcy, December 5th, 1911, she testifies as follows:

"In 1905 Mr. Harvey told me that he was going to give me stock in the Shore Line Investment Company, and he gave me, in June of 1905, 300 shares. He told me as he acquired more he would give them to me; and the reason that he kept them in his own

name was because he was a big holder in the Ocean Shore and that would show his interest in the Shore Line Investment Company, if he kept them in his name. In August he gave me 66 shares. In September he gave me 160 shares and 20 shares, and I put them in my box. . . . . Q. Mrs. Harvey, you say he gave you the stock at the respective months that you named in 1905? A. Yes. Q. What do you mean by saying that he gave you the stock? A. He gave me the certificates. Q. What was the form of the certificates? A. They were like common certificates, and they were endorsed by him. Q. What did you do with the certificates? A. Put them in the Safe Deposit of the First National Bank. Q. You had a box in the safe deposit vault there? A. I had always a box in the safe deposit vault there. Q. How is it you remember the dates at which [39] these certificates were given to you? A. Because I put them down on a memorandum. Q. Did you keep a memorandum of all these things? A. Yes, I did. Q. You say that the first of these certificates was given to you in June of 1905? A. Yes. Q. And he did actually deliver to you a certificate of stock at that time? A. He did. Q. Did he tell you anything further about it? A. No, he said that I was to take it and put it in my box. Q. And you did that? A. I did that. Q. You took that at that time? A. Yes, at that time. Q. You are sure the date was June, 1905? A. I beg your pardon? Q. You are sure of the date as being June, 1905? A. Yes, I am. Q. In relation to this certificate of 66 shares to make Mr. Folger a director, when did Mr. Harvey first have a

conversation with you in that regard? A. Why, about the time of it. That was December, 1906. Q. In December, 1906? A. Yes. Q. And what did he say to you then and what did you say to him? A. He said that he wanted this stock certificate for 66 shares in order to make Mr. Folger a director; and I went to my box and got the certificate for 66 shares, and gave it to Mr. Harvey. Q. That was in what month? A. That was in December, 1906. Q. How did you receive it back again? A. I received it back again endorsed by Mr. Folger's name, and put it in my box. Q. It stood in his name on the books? He endorsed it to you and it was put in your safe deposit box? A. Yes."

Here we have a positive statement that she received the stock at certain dates in 1905, and placed it in her safety deposit box in the First National Bank.

One or two days after the foregoing testimony was given, an attempt was made in the proceeding before the referee in bankruptcy to introduce evidence showing the dates when Mrs. [40] Harvey's safe deposit box had been opened subsequent to June 1st, 1905. The Safety Deposit Company strenuously objected to giving the testimony, but on December 19th, 1911, while Mr. Moffat, an official of the company was again on the witness-stand and being questioned as to the same matter, Mr. Harvey produced a letter from Mrs. Harvey addressed to E. H. Williams, one of the attorneys, which in part is as follows:

"If you wish to learn from the safe deposit company the dates on which I visited my safe deposit box, I have no objection whatever, and am perfectly

willing that the bank officials shall give you the information, and you may tell them so for me. I do not myself know the exact dates of my visits. I have, of course, been there a number of times since 1905, but I have at all times had a safe of my own wherever I have been living, whether here or at Monterey, and I kept many of my papers in these safes, and, as I think it over, I am positive I kept my certificates of stock there instead of in my safe deposit box."

In a subsequent examination before the referee January 5th, 1912, Mrs. Harvey testified that she never had kept the Shore Line Investment Company stock in the safety deposit box, but it always rested in a portable safe which she kept first at the family home in San Francisco, and later in her rooms in the hotel at Monterey; that she had her valuable papers and jewels in this safe, and placed in the safety deposit box only a few letters, a number of antiques, several old deeds, and the wills of herself and Mr. Harvey. Except herself, her maid, Miss Anderson, alone had the combination to the safe. December 5th, Mrs. Harvey was certain that she deposited the stock in the safe deposit box in the First National Bank, but after the trustee made an effort to put in evidence [41] the records of the bank disclosing the fact that Mrs. Harvey had never visited her box at all between June 1st and December 31st, 1905, and during that period there were but three admissions to the box, namely, July 15th, July 17th and November 8th, by Lizzie Anderson, Mrs. Harvey's maid, she remembered the stock had never been deposited elsewhere than in her portable safe. No record is kept of

what was placed in that safe. No one but Mrs. Harvey ever had access to it, except Lizzie Anderson. Lizzie Anderson is not produced as a witness, and her absence is not accounted for. Mrs. Harvey was very positive when testifying December 5th that she received the certificate for 300 shares in June, 1905; later it transpired that she was probably in New York at that very time.

It appears from the evidence that Mrs. Harvey visited her portable safe repeatedly during the time which intervened between June 1st, 1905, and the date of her testimony before the referee. On three different occasions in 1905 she placed stock therein. April 13th, 1907, Mr. Harvey paid the assessment on this stock, and subsequently procured the certificates from Mrs. Harvey in order that the payments might be stamped on them. At that time, if her story is true, she must have taken the certificates from the portable safe, and later returned them. She certainly knew at that time that she had not placed them in the safe deposit box. In December, 1906, she gave the certificate for 66 shares to Mr. Harvey to be transferred to Mr. Folger; later it was returned. In October or November, 1909, she handed all the certificates to her husband to be given to Mr. Fay to enable him to negotiate a loan on all the stock of the corporation for the benefit of the company. The stock was returned to her by Mr. Harvey, and later, on the 26th day of November, 1909, [42] he again received it all from her, to be cancelled and transferred on the books of the company. During all this period her jewelry, and practically all her important papers were kept in

this safe, and yet during the short interval of less than twenty-five months, between November 26th, 1909, and December 5th, 1911, the fact that the stock in question had been kept in the safe, and repeatedly taken therefrom and returned to that depository, was entirely forgotten. If she ever had the certificates in her possession, her habit of placing valuable documents in her safe, unaided by memory of specific circumstances, should have prompted a different answer. It is unfortunate that she did not discover her error until the records of the Safe Deposit Company were called for. It is equally unfortunate that her portable safe keeps no records, that no human being has testified that he ever saw the certificates in the safe, or in her possession, prior to November 26th, 1909, except her husband; that there is in evidence absolutely no contemporaneous record, either in the books and papers of the corporation, or of Mr. Harvey or Mrs. Harvey, or elsewhere, which intimates that Mrs. Harvey had possession of the stock certificates in question prior to November 26th, 1909.

When asked how she remembered the dates at which the certificates were given, Mrs. Harvey replied, "Because I put them down on a memorandum." She kept a memorandum of all these things; each entry was on a separate slip of paper. These slips were subsequently destroyed, after being copied on a single sheet of paper. The copy only is in evidence. Later, she testified that the dates were the dates of the certificates, not the dates of their receipt, and that each memorandum was made on the date

when the corresponding certificate was received. [43]

It is difficult to avoid the suspicion that this change in Mrs. Harvey's testimony was made in order to escape the effect of the evidence showing that she was in New York in June, 1905, at the time she says she received the certificate for 300 shares from Mr. Harvey.

A peculiar feature of this transaction is the fact that for more than four years Mrs. Harvey's ownership of the stock in question was concealed from the public. Mr. Harvey attempts to explain this by saying that he was very largely interested in the Ocean Shore Railroad, and wished to show the people that the Ocean Shore Railroad was interested in the success of the Shore Line Investment Company, and that he was a large holder in it, and would be ready to help it out. Why the same good impression could not have been conveyed by publishing the fact that his wife was a large holder in the Shore Line Investment Company does not appear.

Objection is made that the acts, conduct and declarations of Mr. Harvey subsequent to the delivery of the certificates to Mrs. Harvey in 1905 are not admissible in evidence to impeach her title. This objection would be good if the actual physical delivery of the certificates to Mrs. Harvey at that date, and her exclusive possession thereafter, were conceded or established. This, however, is not the case. Whether Mr. Harvey ever surrendered possession of the certificates, and gave the stock to her in 1905, is

the controlling issue, and as to this the evidence is admissible.

In the complaint it is alleged, and by admissions and evidence established, and I so find, that on the 26th day of November, 1909, Harvey, in person, surrendered the stock and caused it to be transferred on the books of the Investment Company to Mrs. Harvey. The old certificates were cancelled, and new [44] ones were issued to her in lieu thereof. At that time Harvey was hopelessly insolvent, and this fact was known to him and to his wife. The transfer was made and received with intent to delay and defraud Mr. Harvey's creditors, and without other consideration than love and affection.

Bankruptcy proceedings were commenced in this Court against the said Harvey, November 2d, 1910. The answer of Mrs. Harvey is that the stock was given to her in 1905, instead of 1909, and the certificates thereafter were indorsed in blank by her husband, and by him delivered to her in 1905, without intent to delay or defraud his creditors, and at a time when he was solvent. She also declares that ever since 1905, she has retained the exclusive possession of the certificates.

That the delivery was made in 1905 is an affirmative defense, and is a matter which was peculiarly within the knowledge of Mr. and Mrs. Harvey. It has not been proven, and the evidence, in my opinion, preponderates against her, and against her contention.

Let a judgment and decree, as prayed for in the bill of complaint, be entered in favor of the plaintiff.

[Endorsed]: Filed Aug. 6, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [45]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Findings of Fact and Conclusions of Law.

This cause came on regularly to be heard before the Court, the parties being represented by their respective counsel, evidence, oral and documentary, was offered and received on behalf of the respective parties and the cause was submitted on briefs of counsel to be thereafter served and presented, and the Court having duly considered the cause, now finds the facts as follows:

I.

That on the 2d day of November, 1910, certain creditors of J. Downey Harvey filed a petition in the above-entitled court praying that said J. Downey Harvey be adjudicated a bankrupt and that an order to show cause, directed to said J. Downey Harvey was issued by said Court upon said petition, and

that said order to show cause was thereafter duly served upon said J. Downey Harvey and, in response thereto, he appeared and pleaded to said petition, and, after due proceedings had, he was, by an order and judgment of said Court duly given and made, duly and regularly adjudicated bankrupt, and the matter of his bankruptcy [46] duly referred to Hon. A. B. Kreft, a duly and regularly appointed, qualified and acting Referee in Bankruptcy of the above-entitled court, for further proceedings. That thereafter a meeting of the creditors of said J. Downey Harvey was called upon due and proper notice thereof, duly and regularly given, and that said meeting of creditors was regularly continued by the consent of all parties appearing thereat, until the 17th day of November, 1911, at the hour of 2 o'clock P. M. on that day, and that thereupon B. S. Stowe was duly and regularly elected Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, and his bond as trustee fixed in the sum of Five Thousand Dollars, and that thereupon said B. S. Stowe duly gave bond as required and took his oath of office, and that said Hon. A. B. Kreft did, on the 20th day of November, 1911, duly make his order approving said bond, and that ever since said time said B. S. Stowe has been and is now, the duly elected, qualified and acting trustee in bankruptcy of the estate of J. Downey Harvey, a bankrupt.

II.

That on the 26th day of November, 1909, J. Downey Harvey was the owner of five hundred and

forty-six (546) shares of the capital stock of the Shore Line Investment Company, a corporation, duly incorporated under and by virtue of the laws of the State of California, and that since said date dividends have been regularly paid and collected upon said stock in the sum of Eleven Thousand, Four Hundred and Eighty-six ($11,486.00) Dollars.

III.

That on said 26th day of November, 1909, said J. Downey Harvey gave to S. G. Harvey the above-described property and [47] all of it and transferred to her all of said property. That said transfer was made wholly without consideration of any kind or character and that said S. G. Harvey did not confer or agree to confer any benefit whatever upon said J. Downey Harvey for the transfer of said property, or any of it to her, nor did any other person, for or on behalf of said S. G. Harvey confer or agree to confer any benefit whatever upon said J. Downey Harvey therefor. That said S. G. Harvey did not suffer any prejudice nor agree to suffer any prejudice, nor did any person whatsoever for her or on her behalf, suffer or agree to suffer any prejudice, for the transfer of said property or any part of it to said S. G. Harvey, but that said transfer was made by J. Downey Harvey to S. G. Harvey wholly without consideration of any kind, nature or form, and was purely voluntary, to wit, that of love and affection.

IV.

That J. Downey Harvey was, on the 26th day of November, 1909, wholly insolvent, and was unable

to pay his debts from his own means as they became due and that all his assets, taken at a fair valuation and all his property, taken at a fair valuation was insufficient in amount to pay his just debts and liabilities. That said J. Downey Harvey was insolvent, as above set out, and that he ever since has been and now is insolvent. That S. G. Harvey knew, on the 26th day of November, 1909, and at the time of the transfer hereinabove described, well knew that said J. Downey Harvey was insolvent and that said S. G. Harvey had at said times, knowledge of the financial condition of said J. Downey Harvey and knew that he was wholly unable to pay his debts, from his own means, as they became due and that the aggregate of his assets, taken at a fair valuation, were insufficient in amount to pay his just debts and liabilities. [48]

V.

That the transfer hereinabove mentioned was made by J. Downey Harvey to S. G. Harvey by delivering to her certain certificates of the capital stock of said Shore Line Investment Company made out in the name of said J. Downey Harvey and certifying that he was the owner of 546 shares of the capital stock of said company. That when said certificates were delivered they were endorsed by said J. Downey Harvey so as to enable them to be transferred on the books of said company and that they thereupon presented to the proper officers of said company and that certificates, so delivered, were cancelled and a new certificate was thereupon issued by said company to said S. G. Harvey, certifying

that she was the owner of said 546 shares of the capital stock of the Shore Line Investment Company.

VI.

That at the time of the transfer hereinabove mentioned said J. Downey Harvey was largely indebted in the sum of upwards of Two Hundred Thousand ($200,000.00) Dollars to divers unsecured creditors who at said time were, ever since have been and now are, creditors of said J. Downey Harvey holding just and valid claims and debts against him and that said indebtedness, and no part thereof has ever been paid by said J. Downey Harvey, or any person whomsoever in his behalf, but that it, and the whole thereof, is and at all the times herein mentioned was, wholly due, owing and unpaid.

VII.

That all the creditors above named are represented by plaintiff in his capacity as trustee of the estate of J. Downey Harvey, a bankrupt, and that plaintiff is now, and was, ever since the 20th day of November, 1911, the trustee for all of [49] said creditors. That all the assets and property of said J. Downey Harvey and of his estate in bankruptcy are insufficient to pay the creditors thereof, holding just and valid debts, the amount of their claims, and that said creditors, and all of them, and this plaintiff are greatly damaged by the aforesaid transfer and are unjustly deprived of the value of the property so transferred.

VIII.

That said transfer, made as aforesaid, by J.

Downey Harvey to S. G. Harvey was made by him with the intent to delay and defraud the said creditors of said J. Downey Harvey of their demands, and that said transfer was accepted and taken by said S. G. Harvey with the intent and purpose to delay and defraud said creditors of their demands. That said transfer is fraudulent and void as to this plaintiff.

IX.

That dividends on said stock prior to the 26th day of November, 1909, have been declared and said dividends amount in the aggregate to Eleven Thousand Four Hundred and Eighty-six ($11,486.00) Dollars, and said dividends having been paid to the defendant, S. G. Harvey, the plaintiff in this action is entitled to have and recover the same, and that the said dividends arose from said shares of stock and belong to this plaintiff.

X.

That the plaintiff is entitled to have, receive and recover all dividends declared upon said shares of stock, or received by said defendant, S. G. Harvey, subsequent to the commencement of this action, to wit: January 11, 1912.

XI.

That the value of the five hundred and forty-six (546) shares of the capital stock of the Shore Line Investment Company, [50] mentioned in said complaint and the answer thereto, is of the value of at least Fifty Thousand ($50,000.00) Dollars.

XII.

That in the year 1905 said J. Downey Harvey was

solvent and was able to pay his debts from his own means as they became due, and that all his assets taken at a fair valuation and all his property taken at a fair valuation was, during that year, sufficient in amount to pay his just debts and liabilities.

XIII.

That the said J. Downey Harvey did not on or about the 26th day of June, 1905, endorse a certificate for three hundred (300) shares of the capital stock of the Shore Line Investment Company, by writing his name upon the back thereof, or otherwise, to the defendant, S. G. Harvey, nor did he give or deliver said certificate, or the shares represented thereby, to said S. G. Harvey; and that said J. Downey Harvey did not on the 29th day of August, 1905, or thereabouts, endorse to the said S. G. Harvey a certificate of stock for sixty-six (66) shares of the capital stock of the Shore Line Investment Company, and did not give or deliver said certificate, or the shares represented thereby to said S. G. Harvey, the defendant; and that the said J. Downey Harvey did not on or about the 25th day of September, 1905, endorse a certificate, or certificates, for one hundred and eighty (180) shares of the capital stock of the Shore Line Investment Company, or give or deliver said certificates to said S. G. Harvey or the shares represented thereby.

XIV.

That the transfers of said shares of stock of the Shore Line Investment Company were made by said J. Downey Harvey with the intent and purpose to delay and defraud the creditors of the said J. Dow-

ney Harvey, and such transfers were taken and accepted by [51] the defendant, S. G. Harvey, with the intent and purpose to delay and defraud the creditors of said J. Downey Harvey of their demands.

XV.

That the material allegations of plaintiff's complaint are true.

As Conclusions of Law from the foregoing, IT IS ORDERED:

I.

That the plaintiff is entitled to a decree annulling and cancelling the transfers by said J. Downey Harvey to S. G. Harvey, the defendant, for five hundred and forty-six (546) shares of the capital stock of the Shore Line Investment Company, referred to in the complaint, and to have said transfers adjudged to be null and void, and that plaintiff is the owner of all of said shares and certificate of stock, together with all dividends since the commencement of this action, to wit: January 11, 1912, and all dividends received by the defendant, S. G. Harvey, prior to the commencement of said action amounting to the sum of Eleven Thousand, Four Hundred and Eighty-six ($11,486.00) Dollars; and enjoining and restraining the defendants, and all of them, from making any conveyance of said certificate, or the shares of stock represented thereby, and from collecting any dividends thereon, or from making any transfer of said shares, or any of them, and adjudicating the claims of the defendants, and each of them, to said property to be subject to and subordi-

nate to the title of plaintiff; and that plaintiff is entitled to recover his costs herein.

Dated Sept. 17th, 1913.

E. S. FARRINGTON,
Judge.

[Endorsed]: Filed Sep. 19, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [52]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Decree and Judgment.

This cause came on to be heard at the April term of this court and was argued by counsel, and thereupon, upon consideration thereof, IT WAS ORDERED, ADJUDGED AND DECREED, as follows, viz.:

That the defendant, S. G. Harvey, endorse, assign and deliver to the plaintiff the certificate for the shares referred to in the complaint, to wit: Certificate evidencing five hundred and forty-six (546) shares of the capital stock of the Shore Line Invest-

ment Company, free and clear of all liens, pledges and encumbrances, done, made or suffered by the defendant, S. G. Harvey; and that if said certificate has been changed into other certificates of stock, then that such other certificates, evidencing five hundred and forty-six (546) shares of the capital stock of the Shore Line Investment Company, be endorsed, assigned and delivered to said plaintiff in lieu of the certificate referred to.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the said defendant, S. G. Harvey, shall endorse, assign and deliver to the plaintiff, as aforesaid, said certificate of shares of the [53] capital stock of the Shore Line Investment Company, a corporation, within twenty (20) days from the time of the entry of judgment herein; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that in the meantime the defendant, S. G. Harvey, be restrained and enjoined from making any transfer, assignment or conveyance of said certificate of shares, or any of them, or from collecting any dividends thereon; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that plaintiff have and recover judgment against the defendant, S. G. Harvey, in the sum of Eleven Thousand, Four Hundred and Eighty-six ($11,486.00) Dollars, with interest thereon at the rate of seven (7%) per cent per annum from January 11, 1912; and do further have and recover from said defendant, S. G. Harvey, the amount, and amounts, of all dividends received by

her from said certificate of stock subsequent to the commencement of this action. (And for the purpose of ascertaining the amount of such dividends the plaintiff may be entitled to take any necessary supplementary proceedings in this action and to obtain any necessary supplemental decrees.)

The personal property affected by this decree is particularly described as follows:

Five hundred and forty-six (546) shares of the capital stock of the Shore Line Investment Company, a corporation, bearing date November 26, 1909, standing in the name of S. G. Harvey, and all dividends declared thereon, as aforesaid.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiff is entitled to have and recover his costs of suit against the defendant, S. G. Harvey, taxed at $ ———.

Dated Sept. 17th, 1913.

E. S. FARRINGTON,
Judge. [54]

[Endorsed]: Filed Sep. 19, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [55]

In the District Court of the United States, in and for the Northern District of California, Division Number One.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Petition for Order Allowing Appeal and Order Allowing Appeal.

To the Honorable Court, Above Entitled:

The above-named defendant, S. G. Harvey, considering herself aggrieved by the decree made and entered in the above-entitled court on the 17th day of September, 1913, in the above-entitled cause, hereby appeals therefrom to the United States Circuit Court of Appeals for the Ninth Judicial Circuit for the reasons and upon the grounds specified in her assignment of errors filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made and entered as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco; and desiring to supersede the execution of the decree, peti-

tioner hereby tenders bond, in such amount, as the Court may require for such purpose, and prays that her appeal be allowed, that a citation issue as provided by law, and that with the allowance of the appeal, a supersedeas be issued. [56]

And your petitioner further prays that the proper order, touching the security to be required of her to perfect her appeal, be made.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Solicitors for S. G. Harvey, Defendant.

ORDER ALLOWING APPEAL.

The foregoing petition for appeal is hereby granted, and the appeal is allowed, and shall operate as a *supersedeas*, upon the petitioner filing a bond in the sum of Fifteen Thousand (15,000) Dollars, with sufficient sureties, to be conditioned as required by law, and upon also depositing with the clerk of the Court the certificates of stock referred to in the judgment.

Dated, this 21st day of November, 1913.

WM. C. VAN FLEET,
Judge.

Receipt of a copy of the within Petition this 21st day of Nov., 1913, is hereby admitted.

SCHLESINGER & SHAW,
ED. H. WILLIAMS,
Attorneys for Plff.

[Endorsed]: Filed Nov. 21, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [57]

In the District Court of the United States, in and for the Northern District of California, Division Number One.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE, and JANE BLACK,
Defendants.

Assignment of Errors on Appeal.

Now, on this 21st day of November, A. D. 1913, comes the defendant S. G. Harvey, by her solicitor, Charles S. Wheeler, Esq., and avers that the decree entered in *to* the above-entitled cause on the 17th day of November, A. D. 1913, is erroneous and unjust to the defendant, and files with her petition for an appeal from the said decree, the following assignment of errors, and specifies that the said decree is erroneous in each and every of the following particulars, viz.:

1. That the Court erred in admitting in evidence, over the objection of defendant, S. G. Harvey, evidence that J. Downey Harvey was a director of the corporation, Shore Line Investment Company, upon the ground that said evidence was immaterial, and irrelevant, and not responsive to the issues between the plaintiff and this defendant.

2. That the Court erred in admitting in evidence,

over the objection of defendant, S. G. Harvey, evidence that J. Downey Harvey was President of the Corporation, Shore Line Investment Company, upon the ground that said evidence was immaterial [58] and irrelevant, and not responsive to the issues between the plaintiff and this defendant.

3. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, the minute-book of a meeting of the stockholders of the Shore Line Investment Company, wherein it appeared that J. Downey Harvey was present at a meeting held on the 3d day of January, 1906, representing 546 shares of stock of the corporation; that an election of directors was held in which all of the stock present voted, and that J. Downey Harvey was elected a director of the corporation for the ensuing year, upon the ground that said evidence was immaterial and irrelevant and not responsive to the issues between the plaintiff and this defendant.

4. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, the minute-book of an adjourned meeting of the Board of Directors of the Shore Line Investment Company held on April 25, 1907, wherein it appeared that the by-laws of the corporation were amended by written consent of certain stockholders and among the names signed to such written consent, was the name of J. Downey Harvey, holding 546 shares, upon the ground that said evidence was immaterial and irrelevant and not

responsive to the issues between the plaintiff and this defendant.

5. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, the minute-book as to the minutes of a stockholders' meeting held January 2d, 1907, wherein it appeared that the meeting was called to order by J. Downey Harvey, president of the corporation; that J. Downey Harvey [59] was elected chairman of the meeting; that upon a roll-call of the stockholders present, one was J. Downey Harvey, representing 480 shares of stock standing in his name, and that he was elected one of the directors of the corporation for the ensuing year, upon the ground that said evidence was immaterial and irrelevant and not responsive to the issues between the plaintiff and this defendant.

6. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, the minute-book of the Shore Line Investment Company, as to the minutes of a Board of Directors meeting of said Company held December 27th, 1906, from which it appeared that J. Downey Harvey was present as a director of the corporation; that at such meeting a resolution was adopted that the articles of incorporation be amended by and with the written assent of stockholders representing two-thirds of the subscribed capital stock of said corporation; that said amendment to the articles of incorporation was assented to upon the minute-book of the corporation by certain stockholders, among whom was J. Downey

Harvey, holding 546 shares of stock, upon the ground that said evidence was immaterial and irrelevant and not responsive to the issues between the plaintiff and this defendant.

7. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, the minute-book of the Shore Line Investment Company, as to the minutes of the meeting of March 4th, 1909, from which it appeared that the meeting was called by the authority of J. Downey Harvey, President, was called to order by him, and that he voted 546 shares of stock [60] as a stockholder, upon the ground that said evidence was immaterial and irrelevant and not responsive to any of the issues between the plaintiff and this defendant.

8. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant, S. G. Harvey, a portion of the by-laws of the corporation, in substance, providing for and regulating the transfer of stock, upon the ground that said evidence was immaterial and irrelevant and not responsive to the issues between the plaintiff and this defendant.

9. That the Court erred in admitting in evidence, over the objection of the defendant S. G. Harvey, evidence of a conversation between the witness in said case, Burke Corbet, and J. Downey Harvey, relating to the affairs of the Ocean Shore Railway Company, a corporation, in connection with a suit brought in the United States Circuit Court, entitled, Baldwin Locomotive Works vs. Ocean Shore Rail-

way Company, upon the ground that said evidence was irrelevant and immaterial and not responsive to the issues between the plaintiff and this defendant.

10. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant, S. G. Harvey, entries from the private ledger of J. Downey Harvey, appearing under the caption, "Family Gifts and Allowances," upon the ground that such evidence was immaterial, irrelevant and incompetent, self-serving and hearsay.

11. That the Court erred in admitting in evidence over the objection of the defendant S. G. Harvey, evidence as to the method in which the private ledger of J. Downey Harvey was [61] kept, upon the ground that such evidence was immaterial, irrelevant and incompetent.

12. That the Court erred in admitting in evidence over the objection of the defendant S. G. Harvey, testimony that a witness, from an examination of the private ledger of J. Downey Harvey, did not find certain entries therein, regarding the stock of Shore Line Investment Company, on the grounds that such testimony was immaterial, irrelevant and incompetent.

13. That the Court erred in admitting in evidence, and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, a carbon copy of a letter from Edwin Adams Wasserman to J. Downey Harvey, dated September 22, 1907, upon the ground that such evidence was immaterial, irrelevant and incompetent.

14. That the court erred in admitting in evidence, and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, entries in the private journal of J. Downey Harvey, upon the ground that such evidence was irrelevant, immaterial and incompetent, self-serving and hearsay.

15. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, entries in the private trial balance-book of J. Downey Harvey, upon the ground that such evidence was irrelevant, immaterial, incompetent, self-serving and hearsay.

16. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, entries on page 162 of the private ledger of J. Downey Harvey, on the ground that such evidence was irrelevant, immaterial and incompetent, *res inter alios* [62] *acta*, and hearsay.

17. That the Court erred in admitting in evidence, over the objection of the defendant S. G. Harvey, testimony as to the method of keeping the private trial balance-book of J. Downey Harvey, upon the ground that such evidence was irrelevant, immaterial and incompetent.

18. The Court erred in admitting in evidence, over the objection of the defendant S. G. Harvey, books of the records of admissions to the First National Bank's safe deposit vaults and to be read into the record, entries found therein, upon the ground that the same was immaterial, irrelevant and incompetent, *res inter alios acta* and hearsay, and on the

further ground that it appeared from the testimony, that the said books were inaccurately kept, and that the contents thereof was not a matter of substantive evidence and the same was not offered to impeach the testimony of a witness.

19. That the Court erred in admitting in evidence, and in permitting to be read into the record, over the objection of the defendant S. G. Harvey, testimony of the defendant S. G. Harvey given before the Referee in Bankruptcy, upon the ground that such evidence was immaterial, irrelevant and incompetent and not responsive to any of the issues in this case.

20. That the Court erred in admitting in evidence, over the objection of the defendant S. G. Harvey, a letter from S. G. Harvey to E. H. Williams, dated San Francisco, December 19, 1911, upon the ground that *it immaterial*, irrelevant and incompetent, and not responsive to any issues in this case.

21. That the Court erred in admitting in evidence, over the objection of the defendant S. G. Harvey, testimony as to the circumstances under which said letter dated December 19, 1911, [63] was delivered, upon the ground that such testimony was irrelevant, immaterial and incompetent and *res inter alios acta.*

22. That the Court erred in admitting in evidence, over the objection of the defendant S. G. Harvey, the record of the United States District Court, Northern District of California, in a case entitled, Baldwin Locomotive Works vs. Shore Line Railway Company, upon the ground that it was immaterial,

irrelevant and incompetent and as not being in rebuttal, and not being a substantive circumstance tending to impeach the testimony of any witness.

23. That the Court erred in giving and entering judgment in favor of plaintiff and against the defendant S. G. Harvey, on the ground that the complaint does not state facts sufficient to constitute a cause of action.

24. That the Court erred in giving and entering judgment in favor of plaintiff and against the defendant S. G. Harvey, upon the ground that the complaint does not support the judgment.

25. That the Court erred in finding from the evidence in favor of plaintiff and against the defendant S. G. Harvey, upon the ground that the plaintiff failed to make out a *prima facie* case.

26. That the Court erred in finding in favor of plaintiff and against the defendant S. G. Harvey, on the ground that the evidence was insufficient to support the findings of the Court.

27. That the Court erred in finding in favor of plaintiff and against the defendant S. G. Harvey, upon the ground that the Court ignored in the evidence the weight of the sworn answer of the defendant S. G. Harvey. [64]

28. That the Court erred in finding that on the 26th day of November, 1909, J. Downey Harvey was the owner of 546 shares of stock of Shore Line Investment Company, a corporation.

29. That the Court erred in finding that the date on which J. Downey Harvey gave to the defendant

S. G. Harvey, the said stock, was the 26th day of November, 1909.

30. That the Court erred in finding that the defendant S. G. Harvey, knew at the time of the transfer of the said stock that J. Downey Harvey was insolvent.

31. That the Court erred in finding that at the time of the said transfer, J. Downey Harvey was indebted in a sum upwards of $200,000.00 to unsecured creditors.

32. That the Court erred in finding that the plaintiff and said creditors were damaged by the said transfer and were justly deprived of the value of the property so transferred.

33. That the Court erred in finding that the said transfer was made with intent to hinder, delay and defraud creditors of J. Downey Harvey, and that said transfer was accepted and taken by the defendant J. Downey Harvey with like intent.

34. That the Court erred in finding that the said transfer was fraudulent and void as to the plaintiff.

35. That the Court erred in finding that the plaintiff is entitled to the dividends received by the defendant S. G. Harvey on said stock, from the 26th day of November, 1909, and the time of the commencement of this action.

36. That the Court erred in finding that the plaintiff is entitled to recover all dividends declared upon said stock since the 11th day of January, 1912.

37. That the Court erred in finding that J. Downey Harvey did not, on or about the 26th day of June, 1905, [65] endorse a certificate for 300

shares of stock in the Shore Line Investment Company, to the defendant S. G. Harvey, and did not give and deliver the said certificate, and the shares represented by it to her at said time, and that the said J. Downey Harvey did not on the 29th day of August, 1905, and on or about the 25th day of September, 1905, endorse and deliver and give to the defendant S. G. Harvey, other certificates of stock, making in the aggregate 546 shares.

38. That the Court erred in finding that the material allegations of the plaintiff's complaint are true.

39. That the Court erred in its conclusions of law.

40. That the Court erred in giving and entering its decree and judgment in favor of plaintiff and against the defendant S. G. Harvey, on the ground that the evidence was insufficient to support the judgment.

41. That the Court erred in giving and entering its decree and judgment in favor of plaintiff and against the defendant S. G. Harvey, on the ground that there was no evidence of fraud in the transfer of the said 546 shares of stock, and that the Court presumed the fraud in such transfer.

42. That the Court erred in ordering the defendant S. G. Harvey to endorse and deliver to the plaintiff, the certificates for the said 546 shares of stock.

43. That the Court erred in ordering that the defendant S. G. Harvey be restrained and enjoined from making any transfer of said shares, or from collecting dividends thereon.

44. That the Court erred in ordering that the plaintiff have and recover judgment against the defendant S. G. Harvey in the sum of $11,486.00 and to the amount of all further dividends received by the said defendant upon said stock. [66]

45. That the Court erred in giving and entering judgment in favor of plaintiff and against defendant S. G. Harvey, in this, that the Court based its decision and the judgment entered in accordance therewith upon entries in the private account-books of J. Downey Harvey, and his declarations and conduct, the said J. Downey Harvey having filed a disclaimer in said action and not appearing as a party in the trial thereof, and the defendant S. G. Harvey objecting and excepting to the admission of such evidence; that the Court received such evidence as primary and affirmative evidence, and not in rebuttal of any testimony offered on behalf of defendant S. G. Harvey, and that the Court based its decision, findings and judgment chiefly upon such evidence as being primary and affirmative evidence on behalf of plaintiff, as manifestly appears from the opinion of the Court filed in said cause.

46. That the Court erred in giving and entering judgment in favor of plaintiff and against the defendant S. G. Harvey, in this, that the Court held the evidence on behalf of plaintiff, showing a transfer of the corporate stock, the subject of the action, was made upon the books of the corporation, on the 26th day of November, 1909, shifted the burden of proof to the defendant S. G. Harvey to show that such transfer was made between the parties at an

earlier date, as manifestly appears from the opinion of the Court filed in said cause,—the concluding paragraph of which opinion is as follows:

> "That the delivery was made in 1905, is an affirmative defense, and is a matter which was peculiarly within the knowledge of Mr. and Mrs. Harvey. It has not been proven, and the evidence, in my opinion, preponderates against her and against her contention." **[67]**

47. That the Court erred in giving and entering judgment in favor of plaintiff and against the defendant S. G. Harvey, in this, that the Court presumed as a matter of law, from the evidence, that the transfer of said stock was made on the books of the corporation on the 26th day of November, 1909, that the transfer between the parties was made at the same time.

48. That the Court erred in giving and entering judgment in favor of plaintiff and against the defendant S. G. Harvey, in this, that no evidence was introduced showing any fraud in the transfer of said stock, and the Court presumed such transfer to have been fraudulent on the part of the defendant S. G. Harvey.

49. That the Court erred in giving and entering judgment in favor of the plaintiff and against the defendant S. G. Harvey in this, that the Court presumed fraud in the transfer of the said stock, when the facts shown in the evidence would have comported equally as well with the absence of fraud, on the part of the defendant S. G. Harvey.

50. That the Court erred in giving and entering

judgment in favor of plaintiff and against the defendant S. G. Harvey, in this, that the Court ignored and gave no weight to evidence introduced on behalf of the defendant S. G. Harvey of declarations against interest, by J. Downey Harvey, that he had given the said shares of stock to the defendant S. G. Harvey. That plaintiff offered no evidence to rebut such evidence on behalf of the defendant, and the Court should have taken such evidence of the defendant as true as against the plaintiff.

WHEREFORE, the defendant S. G. Harvey prays that said decree or judgment be reversed, and the District Court directed to dismiss the complaint, or that such other relief be awarded as the nature of the case demands.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Solicitors for the Defendant, S. G. Harvey. **[68]**

Due service and receipt of a copy of the within Assignment of Errors this 21 day of Nov. 1913, is hereby admitted.

SCHLESINGER & SHAW,
ED. H. WILLIAMS,
Attorneys for Plff.

[Endorsed]: Filed Nov. 21, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[69]**

Citation on Appeal (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 14th day of March, 1914, being within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the clerk's office of the District Court of the United States, for the Northern District of California in the suit numbered 15,222 in the records of the said Court wherein S. G. Harvey is defendant and appellant, and you are plaintiff and appellee, to show cause, if any there be, why the decree rendered against the said defendant and appellant S. G. Harvey, as in said order allowing appeal and in said decree mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 14th day of February, 1914.

M. T. DOOLING,
United States District Judge.

Reserving all objections and exceptions, receipt of a copy admitted this 16 day of February, 1914.

BERT SCHLESINGER,
A. E. SHAW,
E. H. WILLIAMS,
Solicitors for B. S. Stowe, Trustee, Plaintiff and Appellee.

[Endorsed]: Filed Feb. 16, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[70]**

In the District Court of the United States, in and for the Northern District of California, Division Number One.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Petition for Writ of Error and Order Allowing Writ of Error.

To the Honorable Court, Above Named:

Now comes S. G. Harvey, one of the defendants in the above-entitled action, by Charles S. Wheeler, Esq., her attorney, and respectfully shows, that on the 17th day of September, A. D. 1913, the Court found a verdict against your petitioner, and in favor of B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, the plaintiff above

named, and upon the said verdict, a final judgment was entered on the 17th day of September, A. D. 1913, against your petitioner, S. G. Harvey, the defendant above named.

Your petitioner, feeling herself aggrieved by the said verdict and judgment entered thereon as aforesaid, herewith petitions the Court for an order allowing her to prosecute a writ of error to the Circuit Court of Appeals of the United States, for the Ninth Circuit, sitting at San Francisco, under the laws of the United States, in such cases made and provided.

[71]

WHEREFORE, the premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals, for the Ninth Circuit, sitting at San Francisco in said circuit, for the correction of errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as the law directs, and upon the giving of such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Petitioner in Error.

ORDER GRANTING WRIT OF ERROR.

Writ of error granted upon the foregoing petition, the same to operate as a *supersedeas,* upon the petitioner filing a bond, the amount of which is fixed at Fifteen Thousand (15,000) Dollars, with sufficient

sureties to be fixed as required by law, and upon also depositing with the Clerk of the Court the certificates of stock referred to in the judgment.

Dated this 21st day of November, 1913.

WM. C. VAN FLEET,
Judge.

Receipt of a copy of the within Petition this 21 day of Nov., 1913, is hereby admitted.

SCHLESINGER & SHAW,
ED. H. WILLIAMS,
Attorneys for Plff.

[Endorsed]: Filed Nov. 21, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [72]

In the District Court of the United States, in and for the Northern District of California, Division Number One.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Assignment of Errors [on Writ of Error].

Now comes S. G. Harvey, one of the defendants in the above-entitled action, and plaintiff in error, and in connection with her petition for a writ of error in this cause, assigns the following errors, which plaintiff in error avers occurred on the trial thereof, and

upon which she relies to reverse the judgment entered herein, as appears of record:

1. That the Court erred in giving and entering the judgment herein, or any judgment herein, against the plaintiff in error, in this: That the complaint of plaintiff in the above-entitled cause does not state facts sufficient to constitute a cause of action at law.

2. That the Court erred in giving and entering the judgment in the above-entitled cause, in this: That the complaint in said action is insufficient to support the judgment given and entered herein, upon the ground that the said complaint sets forth a cause of action, if any, for relief in equity, states no cause of action at law, nor upon which any judgment at law may be given and entered, and that the judgment entered [73] herein awards solely equitable relief and none other.

3. That the Court erred in giving and entering the judgment in the above-entitled cause, in this: That the Court was without jurisdiction, sitting as a Court of law, to give and enter the said judgment, and was without jurisdiction as a Court of law to grant any of the relief awarded under said judgment.

WHEREFORE, plaintiff in error prays that the judgment of said Court be reversed, and the District Court directed to dismiss the said complaint as against plaintiff in error.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff in Error.

Receipt of a copy of the within Assignment of Errors this 21 day of Nov. 1913, is hereby admitted.

SCHLESINGER & SHAW,
ED. H. WILLIAMS,
Attorney for Plff.

[Endorsed]: Filed Nov. 21, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [74]

In the District Court of the United States, in and for the Northern District of California, Division Number One.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Writ of Error (Copy).

United States of America,—ss.

The President of the United States to the Honorable Judge of the District Court of the United States, for the Northern District of California, Division Number One, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between S. G. Harvey, plaintiff in error, and B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey,

a bankrupt, defendant in error, a manifest error has happened to the damage of S. G. Harvey, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the party aforesaid, in this behalf do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, [75] so that you have the same, at the City and County of San Francisco, State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the law and customs of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 24th day of November, A. D. 1913.

[Seal] W. B. MALING,
Clerk of the District Court of the United States, in and for the Northern District of California.

C. W. Calbreath,
Deputy.

Allowed this 21st day of November, A. D. 1913.

WM. C. VAN FLEET,
Judge.

Receipt of a copy of the within Writ of Error this 24th day of November, 1913, is hereby admitted.

SCHLESINGER & SHAW,
EDWIN H. WILLIAMS,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 25, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[76]**

Citation on Writ of Error (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth District, to be holden at the City and County of San Francisco, in the State of California, on the 14th day of March, 1914, being within thirty days from the date hereof, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States, in and for the Northern District of California, wherein S. G. Harvey is the plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern Dis-

trict of California, this 14th day of February, A. D. 1914.

M. T. DOOLING,
United States District Judge.

Reserving all objections and exceptions, receipt of a copy admitted this 16th day of February, 1914.

BERT SCHLESINGER,
A. E. SHAW,
E. H. WILLIAMS,
Solicitors for B. S. Stowe, Trustee, Defendant in Error.

[Endorsed]: Filed Feb. 16, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[77]**

In the District Court of the United States, in and for the Northern District of California, Division No. One.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Bond on Appeal and Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, S. G. HARVEY, as Principal and GLOBE INDEMNITY COMPANY, a corporation of the State of New York, as surety, are held and firmly

bound unto B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, in the full and just sum of Thirty Thousand ($30,000.00) Dollars, to be paid to the said B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, his attorneys, or successors, to which payment well and truly to be made, we bind ourselves, and our successors, assigns, administrators, jointly and severally by these presents.

Signed and dated this 8th day of January, A. D. 1914.

WHEREAS, lately at a regular term of the District Court of the United States, for the Northern District of California, sitting at San Francisco in said District, in a suit pending in said court between B. S. Stowe, trustee in bankruptcy of the estate of J. Downey Harvey, a bankrupt, as plaintiff, and [78] S. G. Harvey, as defendant, case Number 15,222, in the first division of said court, a final judgment or decree was rendered against said S. G. Harvey, for the endorsement, assignment and delivery of a certificate evidencing 546 shares of the capital stock of Shore Line Investment Company, a corporation (which said certificate has been by the said defendant endorsed and deposited with the clerk of the Court, in accordance with an order of the Court), and further for the sum of Eleven Thousand Four Hundred and Eighty-six ($11,486.00) Dollars, and interest thereon, at the rate of seven (7) per cent per annum, and which said judgment further provides that plaintiff "do have and recover from said defendant, S. G. Harvey, the amount, and amounts, of all

dividends received by her from said certificate of stock subsequent to the commencement of this action (and for the purpose of ascertaining the amount of such dividends the plaintiff may be entitled to take any necessary supplemental proceedings in this action and to obtain any necessary supplemental decrees)"; and it not clearly appearing whether the cause hereinabove referred to is at law or in equity, and the said S. G. Harvey having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court, to reverse the said decree, as well as a citation directed to the said B. S. Stowe, as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the —— day of ————, A. D. 191—, and the said S. G. Harvey having also obtained a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the [79] Clerk of the Court, to reverse the judgment of the said District Court of the United States, for the Northern District of California, and a citation directed to the said B. S. Stowe as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, citing him to be and appear before the said United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, according to law;

NOW, THEREFORE, the condition of the above obligation is such that if the said S. G. Harvey shall prosecute her said appeal to effect, and answer all damages and costs if she fails to make her plea good, and also that if the said S. G. Harvey shall prosecute a writ of error to effect, and answer all damages and costs, if she fails to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

S. G. HARVEY,
Principal.

GLOBE INDEMNITY COMPANY,
By R. P. FABJ,
Resident Vice-president.

[Seal] Attest: JOY LICHTENSTEIN,
Resident Assistant Secretary.

The foregoing Bond on Appeal and Writ of Error is hereby approved this 10th day of January, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 10, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [80]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Statement of Evidence to be Included in the Transcript on Appeal by the Defendant, S. G. Harvey.

The above-entitled cause came on regularly for trial before the Court, on the 4th day of April, 1912, Schlesinger & Shaw and Edwin H. Williams, Esqs., appearing for the plaintiff, and Charles S. Wheeler, Esq., appearing for the defendant, S. G. Harvey, and thereupon the following proceedings were had:

[Statement of Case by Mr. Schlesinger, for Plaintiff.]

Mr. SCHLESINGER, for the Plaintiff.—"I desire to make a brief statement of the case.

"Omitting the formal allegations of the complaint, the charge is that on the 26th day of November, 1909, J. Downey Harvey was the owner of 546 shares of the capital stock of the Shore Line Investment Company of the value of $109,200, and that dividends in the amount of $11,486 have been paid on that stock.

"That on November 26th, 1909, J. Downey Harvey gave to S. G. Harvey, his wife, the above-described property without consideration. [81]

"The answer does not deny that the property was transferred without a valuable consideration and avers that the consideration of the transfer was love and affection.

"Our complaint charges that at the time of the transfer J. Downey Harvey was insolvent and that S. G. Harvey knew he was insolvent at the date of the transfer. The denial in the answer is merely of a legal conclusion that he is insolvent, and there is no denial of our averment that he was unable to pay his debts from his own means as they became due, and that all his assets, taken at a fair valuation, were insufficient in amount to pay his just debts and liabilities. We then aver that at the time of the transfer J. Downey Harvey was indebted in the sum of upwards of $200,000 to divers unsecured creditors holding just and valid claims and debts against him, and that no part of said indebtedness has ever been paid, but that the whole thereof is and was at all the times mentioned in the complaint due, owing and unpaid. That allegation is wholly undenied.

"Then comes allegation ten, that the transfer was made with intent to delay and defraud the creditors of J. Downey Harvey, and that it was taken and accepted by S. G. Harvey with the intent and purpose to delay and defraud his creditors. That said transfer is fraudulent and void.

"The main issue of the case seems to be as to the date of this transfer, the answer denying that on the

26th day of November, 1909, or at any time since the year 1905, J. Downey Harvey has been the owner of the stock in question. The answer then alleges that the stock is not worth anything over the sum of $50,000.

"We contend that if this stock was transferred to Mrs. Harvey at all it was transferred to her on November 26th, 1909, when the insolvency of Mr. Harvey is conceded in the pleadings." [82]

Mr. WHEELER.—"I think that the issue in this case narrows itself down to very small limits. We contend upon our side and in defense that Mrs. Harvey received the stock in question by gift from her husband in the year 1905; the plaintiff contends that it was given to her on November 26th, 1909, when a transfer of the stock was made upon the books of the corporation. We contend that for four and a half years prior to that time Mrs. Harvey had owned that stock, and that it had been hers; and so far as we can see, the only issue in the case is that issue of fact, did Mrs. Harvey own the stock, as she contends, in 1905, or is it true, as plaintiff contends, that she did not acquire it until 1909."

[Testimony of Burke Corbet, for Plaintiff.]

BURKE CORBET, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. SCHLESINGER.)

"I am the Secretary of Shore Line Investment Company, a corporation, and have held that office ever since the organization of that company in May

(Testimony of Burke Corbet.)

or June, 1905. I have in my possession the minute-books of the corporation; also the stock certificate book brought into existence as a result of the fire of 1906. I also have in my possession the original certificates issued to Mr. Harvey."

The following certificates produced by the witness were thereupon examined and received in evidence:

Date of issue Certificate No. 2, June 26th, 1905; name, J. Downey Harvey. Certificate No. 30; name, J. Downey Harvey. Certificate No. 38, date of issue, September 25th, 1905; name, J. Downey Harvey. Certificate No. 39, September 28th, 1905; name, J. A. Folger. Certificate No. 61, date of issue, December ——, 1905. Certificate No. 70, date of issue, December ——, 1906. [83]

The witness then further testified as follows: "The last certificate for 66 shares was a reissuance of the stock represented by the Folger certificate to Mr. Harvey, issued when the other certificate to Mr. Folger was canceled. The certificates which have been introduced in evidence stood in the names of the parties named in them respectively, up to the 26th day of November, 1909 (with the exception of the Folger certificate, which had been previously transferred to Mr. Harvey), at which last-mentioned date, November 26th, 1909, the stock represented by Certificate No. 2 for 300 shares, Certificate No. 38 for 160 shares, Certificate No. 39 for 20 shares, and Certificate No. 70 for 66 shares, was transferred into the name of Sophie G. Harvey, and Certificate No. 83, bearing that date, was issued in her name for that

(Testimony of Burke Corbet.)

stock, amounting to 546 shares. These shares have never rested in the name of Mrs. Harvey up to that time."

The witness was thereupon asked by counsel for plaintiff whether J. Downey Harvey was during all of the above mentioned times a director of the corporation. To this question, counsel for the defendant S. G. Harvey objected as being immaterial and irrelevant. The objection was overruled by the Court, and it was thereupon stated by Mr. Wheeler: "Will it be understood that we have an exception on all rulings?" Mr. Schlesinger: "That is satisfactory." To the question the witness answered "Yes."

The witness was thereupon asked whether J. Downey Harvey was also President of the corporation. To this question there was the same objection and ruling, and the witness further testified:

"That on the 3d day of January, 1906, Mr. Harvey was elected President of the Board of Directors of the corporation, and has been its President ever since."

The witness was thereupon requested to produce and read [84] into the record the minutes of the stockholders' meeting of the Shore Line Investment Company held on January 3d, 1906. This was objected to as immaterial and irrelevant, and the objection was overruled.

The minutes of the said meeting were thereupon read into the record and from the minutes it appeared that J. Downey Harvey was present at said meeting, representing 546 shares of stock of the corporation;

(Testimony of Burke Corbet.)

that the election of directors was held, at which all of the stock present voted, and that J. Downey Harvey was elected a director of the corporation for the ensuing year.

The witness was thereupon requested to produce and read into the record the minutes of a regularly adjourned meeting of the Board of Directors of the Shore Line Investment Company, held on April 25th, 1907. This was objected to as immaterial and irrelevant, and the objection was overruled.

The minutes of the said meeting were thereupon read into the record and from the minutes it appeared that J. Downey Harvey was present at said meeting. The minutes of said meeting show that the secretary announced that more than two-thirds of the stockholders had signed written consent to changing the by-laws, which written consent had been filed with the secretary of the corporation, amending Article 14 of the by-laws. Said amendment was in the words and figures following:

We, the undersigned, stockholders of the Shore Line Investment Company, have and do hereby give our written assent that the by-laws of said corporation be amended so that Article 14 thereof shall read as follows, to wit:

ARTICLE XIV.

CHECKS.

Checks of the corporation on the Treasurer, or on any bank where it may have funds deposited, may be signed and will be [85] valid if signed by two individuals of the following officers, to wit: Presi-

(Testimony of Burke Corbet.)

dent, Vice-President, Treasurer, Secretary, Assistant Secretary, or members of the Board of Directors, that is to say: provided, that one individual holding more than one office shall have power hereunto to sign such checks only as to the office, and never in a dual capacity.

Names of Stockholders.	No. of Shares.
J. Downey Harvey.	546.

Said minutes were offered and admitted in evidence.

The witness was then requested to read into the record the minutes of a stockholders' meeting held January 2d, 1907, to which the defendant made the same objection, which was overruled. Said minutes were thereupon read into the record, and from them it appeared that the meeting was called to order by J. Downey Harvey, President of the corporation; that J. Downey Harvey was elected chairman of the meeting, and that upon a roll-call of the stockholders present, one was J. Downey Harvey, representing 480 shares of stock standing in his name, and that said J. Downey Harvey voted said 480 shares of stock without having any proxies therefor, although he did have proxies from other stockholders representing 1692 shares of stock. It further appeared from said minutes that J. Downey Harvey was elected one of the directors of the corporation for the ensuing year, and that other corporate business was transacted at said meeting, including the ratification of all the acts, doings and business transactions of the

(Testimony of Burke Corbet.)

Board of Directors for the year ending January 2, 1907.

The witness was then requested to read into the record the minutes of an adjourned meeting of the Board of Directors of the said company, held December 27th, 1906. To this question there was the same objection and ruling. The minutes were thereupon read into the record, and it appeared that J. Downey [86] Harvey was present as a Director of the corporation, and that at said meeting a resolution was adopted that the articles of incorporation be amended by and with the written assent of the stockholders representing two-thirds of the subscribed capital stock. That said amendment provided that the number of the directors of said corporation shall be five, and that the names and residence of those appointed for the first year are as follows, to wit: (Among others, J. Downey Harvey, City and County of San Francisco, State of California.)

That on page 81 of the minute-book immediately following the record of said meeting appears the following:

We, the undersigned, being the owners and holders of the number of shares of the capital stock of the Shore Line Investment Company set opposite to each of our respective names, and representing and owning more than two-thirds of the subscribed and more than two-thirds of the issued capital stock of the Shore Line Investment Company, have and do hereby give this, our written assent, that the Articles of Incorporation of the Shore Line Investment Com-

(Testimony of Burke Corbet.)

pany shall be amended so that Article 5 thereof shall read as follows, namely:

That the number of the directors of said corporation shall be five (5) and the name and residence of those who are appointed for the first year and until their successors are elected and qualified are as follows, viz.:

Walter E. Dean, City and County of San Francisco, State of California.
J. Downey Harvey, Do.
Charles C. Moore, Do.
Charles Carpy, Do.
Chas. Webb Howard, Do.
Charles N. Felton, Menlo Park, State of California.

[87]

Names.	Number of Shares of Stock.
J. Downey Harvey.	546.

The witness further testified: "I am familiar with the handwriting of J. Downey Harvey, and the signature is in the latter's handwriting."

Subject to the same objection and ruling, the witness thereupon read into the record the minutes of the special meeting of the stockholders of the said company, held on May 4th, 1909, from which it appeared that the meeting was called to order by J. Downey Harvey, President; that the meeting was called by the authority of the President, and that J. Downey Harvey voted 546 shares as a stockholder. A resolution was regularly proposed to the stockholders, authorizing the Board of Directors to sell all the waterfront property belonging to said corporation.

(Testimony of Burke Corbet.)

Subject to the same objection and ruling, there was offered in evidence and read into the record, Article 11 of the By-laws of the corporation, substantially, as follows:

"Shares of the corporation may be transferred at any time by holders thereof, or by a party legally constituted, or by legal representative by endorsement on the certificate of stock, but no transfer shall be valid until the surrender of the certificate and acknowledgment of the transfer on the books of the corporation."

The witness thereupon further testified: "I have never acted as attorney for J. Downey Harvey, nor has he ever paid me any counsel or attorneys' fees. I have consulted with him in a friendly way on some of his matters. I knew that a case was brought in the United States Circuit Court, entitled Baldwin Locomotive Works vs. Ocean Shore Railway Company." [88]

The witness was then asked whether he had ever discussed that case with Mr. Harvey. To any and all testimony relating to this suit defendant objected as being irrelevant and immaterial.

Mr. WHEELER.—"My opinion is we are now going into another matter, that is the question of Mr. Harvey's solvency in 1909. Mr. Harvey's solvency in 1909 is not an issue here; while we have denied for want of information and belief, as to whether or not he was insolvent in 1909, we make no claim, your Honor, as to that stock unless it was given to Mrs. Harvey in 1905; if Mrs. Harvey did not receive the gift of that stock in the year 1905,

(Testimony of Burke Corbet.)

then that stock belongs to Mr. Harvey's creditors; if it was given to her in 1905 it belongs to Mrs. Harvey; that is the case as we see it, and so it is entirely immaterial, and there is no need at all of going into a question of anything in 1909."

Mr. SCHLESINGER.—"It shows the motive for the transaction, one of the motives, and it will not take a long while, the introduction of that record will probably not require 10 minutes."

The COURT.—"I will let you prove it, but I do not see its relevancy to the matter at all."

The objection was overruled and the witness further testified: "The affairs of the Ocean Shore Railway Company were discussed in the Directors Meetings, prior to the bringing of that suit, and while it is possible that in conversing with Mr. Harvey, upon leaving him something was said about the affairs of the Ocean Shore Railway Company, I do not recollect any specific time that I did so. The suit was commenced at the request of the Board of Directors of the Ocean Shore Railway Company, in which meeting and in which request Mr. Harvey participated. It was thought that the Ocean Shore might be forced into a receivership by reason of its being unable to pay [89] some of its liabilities and those thoughts and discussions were expressed and discussed prior to November 26th, 1909.

"I do not know who paid for the assessment on the Harvey stock in the Shore Line Investment Company. Only one assessment was ever levied or paid on the Shore Line Investment Company's stock. At

(Testimony of Burke Corbet.)

the time this stock was transferred on November 26th, 1909, the certificates were brought to me by J. Downey Harvey. He gave the certificates to me and requested the transfer to be made."

Mr. WHEELER.—"I offered an admission a moment ago there was an assessment levied upon this stock in 1907, after it had been given to Mrs. Harvey; Mr. Harvey paid that assessment upon the stock; we claim that he did not have the certificate at the time that he paid the assessment but that subsequently he procured the certificate from Mrs. Harvey and the payment thereof was stamped on the stock."

The witness then further testified: "That duties of the President of the Shore Line Investment Company are defined in the by-laws in the form usually used by corporations. He is authorized to sign checks and deeds. He, Mr. Harvey, was an active president at all times from taking the office until the present time. Mr. Harvey had no other stock appearing upon the books of the Company, beside the 546 shares, until June 1st, 1909, on which date there was issued to him Certificate No. 80 for 10 shares. That was all the stock he had until December 22d, 1911."

Cross-examination by Mr. WHEELER.

In response to questions asked by Charles S. Wheeler, Esq., representing S. G. Harvey, the above-named witness testified as follows: **[90]**

"From the first to last, Mr. Harvey has owned upon the books of the corporation, 556 shares in all.

(Testimony of Burke Corbet.)

Of these, 546 are the shares in dispute in this action. The additional certificate for 10 shares went into his name on the books of the corporation on June 1st, 1909. These 10 shares still stand in his name on the books of the corporation, but as a matter of fact have been transmitted to his Trustees in Bankruptcy. On the 20th day of December, 1906, certificate No. 30 for 66 shares was surrendered and canceled, and on the same date a certificate for the same number of shares was issued in the name of J. A. Folger, being Certificate No. 61, and bearing date December 20th, 1906. This was part of the 546 shares here in controversy. Prior to that time these shares had stood in the name of J. Downey Harvey. After the transfer they remained in Mr. Folger's name until December 19th, 1907, at which time Certificate No. 61 was surrendered to me as Secretary, and a new certificate, No. 70, was issued in the name of J. Downey Harvey for the 66 shares of stock.

"The certificate issued in the name of Sophie G. Harvey was receipted for on November 26th, 1909, the signature being 'Sophie G. Harvey by J. Downey Harvey.' I told Mr. Harvey this was not satisfactory to me and wrote out a subsequent receipt which he brought me."

To the introduction of this receipt plaintiff objected as immaterial, irrelevant and incompetent, and a self-serving declaration. The objection was overruled and the receipt was read into the record dated, "San Francisco, November 26th, 1909" and signed,

(Testimony of Burke Corbet.)

"Sophie G. Harvey."

The witness then further testified: "I am a member of the Bar of the State end of this Court. All of the minutes I have read were dictated by me to my stenographer, and drawn under my supervision. I know that [91] Mr. Harvey signed the document introduced in evidence giving assent to the amendment of the by-laws of the corporation.

"Prior to the issuance of any stock in the Shore Line Investment Company to J. Downey Harvey, I had conversation with him upon that subject."

To the testimony of this conversation, plaintiff objected as immaterial, irrelevant and incompetent. The objection was overruled and the witness testified:

"Prior to the issuance of any stock whatever, in the name of Mr. J. Downey Harvey, I had a discussion with him as to how the stock that was subsequently issued in his name should be issued. He said to me at that time that he was buying the stock and was giving it to Mrs. Harvey. I suggested to him then that if this was true the stock should be issued in Mrs. Harvey's name. Mr. Harvey said that he preferred to have it issued in his own name because he wanted to be a Director of the corporation, and wanted to participate actively in the management of the corporation. I told him at that time, and at a number of other times when subsequent stock certificates were issued in his name, that I thought the stock ought to be issued in the name of Mrs. Harvey, if she was the owner of the stock, and

(Testimony of Burke Corbet.)

advised him at different times to that effect."

"At all of those times before any stock was ever issued in the name of Mr. Harvey, he stated to me that he had given the stock to Mrs. Harvey. After the stock was issued, we discussed it a number of times, and he told me he had given it to Mrs. Harvey. At the time that I drafted the document above referred to, and at the several times when Mr. Harvey voted or acted in the corporation as a stockholder, I knew the matters I have just testified to. The reason that I, knowing these facts permitted him to sign a document, 'we, the undersigned owners and holders of the number of shares of stock,' etc., was [92] because the stock showed on the books of the corporation in Mr. Harvey's name, and I deemed it advisable, in order to make the thing show as being a legal document, that it be signed by Mr. Harvey, and I advised Mr. Harvey at that time to sign the document."

Redirect Examination.

Upon redirect examination the witness testified: "The receipt bearing the date the 26th day of November, 1909, I think was delivered to me at the time that the stock certificate was delivered to Mr. Harvey. I did not see Mrs. Harvey in connection with the matter. The receipt is signed by Mrs. Harvey in her handwriting."

Recross-examination.

In response to further questions by Mr. Wheeler, representing the defendant S. G. Harvey, the witness testified:

(Testimony of Burke Corbet.)

"The receipt for the stock upon the stub-book, signed by Mr. Harvey for Mrs. Harvey, was before I delivered the stock certificate to Mr. Harvey. I retained that certificate of stock in my possession until Mr. Harvey brought me Mrs. Harvey's receipt."

[Testimony of Edwin Adams Wasserman, for Plaintiff.]

EDWIN ADAMS WASSERMAN, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

"I am the same person who testified before the Referee in Bankruptcy in the J. Downey Harvey matter. I know Mr. Harvey very well. I was his secretary for about 10 years and kept his books during most of that time. I entered Mr. Harvey's office, not directly in his employ, in 1896, and left in 1907."

(Referring to a book handed him, the witness testified:) **[93]**

"This is the private ledger of J. Downey Harvey. He only had one. On page 44 appears an account of shares of stock in the Shore Line Investment Company. I opened that account and made the entries therein up to January 1st, 1907. The following entry, April 13, 1907, is also in my handwriting. 'To cash assessment No. 1, 546 shares at $10, $5460.' "

The witness was thereupon requested to read all entries appearing under the caption "Family Gifts and Allowances." This was objected to by the coun-

(Testimony of Edwin Adams Wasserman.)

sel for defendant, S. G. Harvey, as immaterial, irrelevant and incompetent, self-serving and hearsay. The objection was overruled, and witness read: "Shore Line Investment Company. This stock was purchased for Mrs. Harvey and belongs to her."

The witness then further testified: "I do not know in whose handwriting are the words, 'This stock was purchased for Mrs. Harvey and belongs to her.' All of the entries are in my handwriting, up to and including April 3d, 1907. These entries are as follows:

1905.

June 20	To cash	$7,500.00
Aug. 22	To cash Feltin interest B. Corbet	1,000.00
Aug. 24	To cash Feltin interest A. D. Bowen.....	650.00
Sep. 22	To cash 170 shares at 50	8,500.00
Sep. 26	To cash 10 shares at $50.....	500.00
	Total.....	$18,150.00

"Then for bookkeeping purposes a balance was carried forward and brought down under date January 1, 1907, 'To balance $18,150. April 13, 1907, to cash assessment No. 1, 546 shares at 10, $5460.' "

These entries were thereupon offered and admitted in evidence.

The witness then further testified: "At page 162 is a caption, 'Family Gifts and Allowances,' I do not know in whose handwriting is the entry 'March 31, [94] 1910, S. L. I. Co. Stock 23610.' The cap-

(Testimony of Edwin Adams Wasserman.)

tion is in my handwriting."

Mr. WHEELER.—"I understand to all this I have the same objection."

The COURT.—"Yes."

The witness then read the following:

"1907.

January	11	To cash Mrs. H.....	$200.00
January	28	To cash Mrs. Harvey.....	300.00
February	21	To cash Mrs. Harvey, O. S. Assessment No. 3.....	500.00

"The letters O. S. Assessment No. 3, mean the Ocean Shore Railway Company Assessment No. 3.

"I kept this book up to February 21, 1907. Up to April 18, 1906, it was in our office in the Columbian Building; after that it was removed to Mr. Harvey's residence and at different times in the evening when I could not find time during the day I took it to my own home.

"I received no directions from Mr. Harvey at the time I opened the account in regard to the Shore Line Investment stock. I kept the book always at Mr. Harvey's Office, excepting that very occasionally I took it home."

To a question whether it was his practice to enter gifts to Mrs. Harvey under "Family Gifts and Allowances," counsel for the defendant S. G. Harvey objected as immaterial, irrelevant and incompetent and the objection was overruled and the witness answered, "It was."

Subject to the same objection the witness testified:

(Testimony of Edwin Adams Wasserman.)

Mr. SCHLESINGER.—Q. "Will you please read the entry appearing under date of March 31, 1910?

A. "Family Gifts and Allowances, Mrs. H. 20 shares pfd.—I presume that is preferred—May 14, 1907, $1,000."

Q. "What is the total drawn there?

A. "And under the same date, 'mortgage notes payable, [95] page 58, $3,000, total $4,000.' "

The witness then further testified, subject to the same objection, as follows:

"On page 3 of the ledger under the caption:

'Pacific lot north line of Pacific Avenue, 137 6 west of Devisadero Street, 43 6 by 137 6.

1905.

January 10.	To cash Shainwald, Buckbee & Co. 10%.....	$1531.25
February 16.	To cash F. J. Baker, surveyor...	1500.00
February 27.	To cash Shainwald, Buckbee & Co...	13781.25
	Total.....	$15327.50'

"On the other side of the page there is an entry, under date of December 31st, 1905, 'by personal expense, gift to Mrs. Harvey, $15,327.50,' which balances the account."

Subject to the same objection and ruling, the witness further testified:

"I do not find any such entry in my handwriting in regard to the Shore Line Investment Company stock. There is an entry, but not in my handwrit-

(Testimony of Edwin Adams Wasserman.)

ing. On page 44 of the ledger under an entry dated March 31st, 1910, the initials F. G. & A. presumably indicate Family Gifts and Allowances. I do not know if that entry was made when it bears date."

The witness then identified as having been written by him at that time, a carbon copy of a letter dated September 22, 1907, written by the witness to J. Downey Harvey. To the introduction of this letter in evidence counsel for the defendant S. G. Harvey objected on the ground that it was immaterial, irrelevant and incompetent. The objection was overruled and said letter was offered and admitted in evidence.

"2229 Union Street,
San Francisco, Sept. 22nd, 1907.

Dear Mr. Harvey:—

In order to give you the statement YOU DESIRE with regards your affairs have gone thoroughly over your accounts this Saturday **[96]** evening and today (Sunday) and beg to render you the following:

Your liabilities and interest charges monthly are as follows:

(Testimony of Edwin Adams Wasserman.)

Liabilities.			Interest Charges.
First National Bank.....	$200,964.37		$ 951.70
Of this amount $52,000 and interest amounting to $4000 more will be paid by Pac. L. & Power Co.....			
First National Bank, Murphy Note	45,000.00		232.50
Hibernia Savings & Loan Soc.			
Columbian Bldg..... 29,600		$158.71	
Do. 114,000		477.92	
East & Merch.....100,000		416.67	
Mission Plaza 60,000		250.00	
	303,600.		1,303.30
Mercantile Trust Co.....	60,000		
Claus Spreckels	57,800		
Mutual Savings Bank.....	17,000		
Phelan	20,000		
Carpy	20,580		
Butler	21,000		
Interest rebated on taking up of mortgage.			
Total liabilities.....	$745,944.37	Total Mo. Int..	$3,320.29

To offset the above monthly interest charges as above amounting to $3,320.29 you have an AVERAGE MONTHLY INCOME as follows:

Eastern Oregon Land Co. dividend.....	$98.25
(There will be an additional dividend of 30% resulting from sale of timber land in the next sixty days which will practically take care of Butler note of $7000, interest on which was paid other day.)	
Stearns *Raches* Company.....	278.40
Columbian Building.....	1200.00

(Testimony of Edwin Adams Wasserman.)

East & Merchant Streets—

Pockwitz	$552.	
Teitjen	90.	
		642.00
Mission Plaza (Woodwise)		220.00
Bliss Tract		50.00

(This will be increased to at least $100 after December first this year.)

First National Bank Dividends—Figured they will average six per cent on value of 946 shares at $210, or $198,660 ..... 1000.00

Pacific Light & Power Co. Interest on balance due for sale of Warner Ranch, viz.: $52,000, will average 217.34

(This interest will be applied to reduce debt to First National Bank but as you are paying interest monthly the interest on contract will be applied to reduction of your principal at the bank and consequently should be classed as a monthly income to offset the interest charge included above.) [97]

Ocean Shore Railway Bonds .....$ 300.00

(Assmt. No. 3, $53,000 purchased bonds at 91. This does not include No. 4105 advanced Roberg's stock bonds which I suppose go as collateral with note and interest payable to you.)

Phil*ip*ine Tel. Bonds	30.00
Phil*ip*ine Tel. Stock	20.00

(Testimony of Edwin Adams Wasserman.)

Miscellaneous.

Income from Cucamonga Stock (Vineyard) ⅓ in Polk Street lot, San Jacinto Neuvo Land, University Club note, etc., will average	75.00

Total average monthly income.....$3,950.95

This amount does not come in monthly, however; the bank stock dividends are payable in January and December, and the other dividends are scattered irregularly throughout the year, but will average this monthly. Your interest charges amount to $3,320.29 per month, while your income averages $3,950.95.

Your liabilities as above are $745,944.37. Following are a list of your assets:

Columbian Building	$275,000.00
East & Merchant Streets	180,000.00
Mission Plaza	75,000.00
Butler Lot	25,000.00
Eastern P. Land Co. Stock 1.20	22,000.00
Stearns Ranchos at 60	16,870.00
Bank Stock 946 sh. at 210	198,660.00
Bliss Tract Lots	20,000.00
Altadena Land	8,000.00
Lincoln Ave. Water Co.	998.00
Huntington Redondo	50,000.00
Frederick St. Lot	800.00
Cucamonga L. & I. Co.	3,500.00
Do Vineyard Co.	8,700.00
Cucamongo property 7/15ths	806.66
New Amsterdam Casualty Co.	2,500.00

(Testimony of Edwin Adams Wasserman.)

Visitacion Valley Land	1,000.00
Burlingame Land	5,000.00
University Club Lot	500.00
Pacific L. & P. Co	52,000.00
San Jacinto Neuvo *Ro*	8,500.00
Burlingame Land Co	5,000.00
Philippine Tel. & Tel. Co. Stocks and Bonds	22,500.00
Bank of Half Moon Bay	2,500.00
Polk Street lot ⅓	4,465.84
Santa Cruz Beach Co. $4,000 less half given Mrs. H.	2,000.00
Mission Block interest cash put up with Deane	5,000.00

Besides the above, you should take into consideration the following:

Due from Rogers for three assessments paid Ocean Shore Stock secured by stock and bonds	13,420.00
Ocean Shore Rwy. Co.—Cash put in not including assessment No. 3	283,613.17
Ocean Shore bonds given in payment Assessment No. 3	55,000.00
Shore Line Inv. Co.	23,610.00

[98]

Following Nevada Mining Ventures representing cash paid in:

Forward		$374,643.17
Ex. Bullfrog Banner	$5,000	
Midas Bullfrog	8,750	

(Testimony of Edwin Adams Wasserman.)

Bullfrog Banner less ½ given
S. G. H..... 1,500

15,250.00

$389,893.17

Assets on previous page..$993,394.30
" above..... 389,893.17

$1,383,287.47

Your liabilities are $745,943.37, and your assets the above amount which show very well on paper, but the trouble is the assets are given at a fair valuation, but if turned into cash, if it was absolutely necessary to meet your obligation they would not bring that figure, you know.

I would advise a careful study of the above with a view of disposing of all your assets that you possibly can at a valuation a little in advance of the above if possible, and paying off the debts as fast as possible. For although the liabilities are only a trifle over half the assets the interest and income on each about balance. If the various small properties and even the bigger ones could be turned into cash and applied on the indebtedness I think everything will turn out for the best.

I forgot to mention the amount of $2144.31, which the Ocean Shore owes you for expenses of Eastern trip when you tried to sell bonds last year.

If you wish to see me about the above to-morrow

(Testimony of Edwin Adams Wasserman.)

please telephone me.

Respectfully yours,"

The witness then continued: "I do not remember whether I handed that letter to Mr. Harvey or mailed it to him. I had no communication with him about it."

Mr. SCHLESINGER.—Q. "I will call your attention to your testimony given before the Referee on page 38: 'Q. Did you ever discuss that letter with him at any subsequent time to its writing?' and did you answer, 'I think I did.' 'Q. What was said at the time, if you remember?' 'A. I think I told Mr. Harvey that in view of his condition something should be done to reduce his liabilities, the interest charges and liabilities.' [99] 'Q. He had no suggestions to make in regard to the letter, did he?' 'A. No.' Did you give that testimony? Read it carefully."

"A. Yes, I did."

Q. "And that is your testimony to-day to the same subject?"

A. "Yes, practically the same."

The witness then further testified: "I never made any notation among the accounts which I kept in that ledger of any gift of that stock to Mrs. Harvey."

Mr. SCHLESINGER.—Q. "Was it your custom to make notations of that character when you learned the facts?"

A. "Well, I could not say yes—or no."

Q. "I will ask you whether you gave this testimony appearing upon page 40: 'Was it your custom

(Testimony of Edwin Adams Wasserman.)

to make notations of that character when you learned the facts?' 'A. It was, certainly.' And you were asked again 'It was?' and did you say 'Certainly'?

"Q. What is your answer as to that?"

A. It is pretty hard to say one thing at one time and one at another; so I presume it was my statement.

Q. "You do not impeach the integrity of this record, do you, Mr. Wasserman?"

A. "No, sir, I do not."

The witness then further testified: "I sometimes discussed with Mr. Harvey entries in his books. He usually gave me pencil memoranda before I made entries. It was by this means that I got the knowledge to make entries in the books concerning the account with the Shore Line Investment Company. Either from that source, or from the stub of the check-book. Sometimes he made an entry on the check-book, sometimes I did, when I drew the check. The purpose of this was so that proper entries could be made in his books, and I could have knowledge of his business. **[100]** Mr. Harvey must have had knowledge of the entries in the trial balances. I gave him a statement of his account. He never went over them with me. The only entry in the trial balance, in relation to the Shore Line Investment Company stock, to my knowledge, was carried forward to January 1st, 1907, $18,150. It was carried that way up to the time I ceased to be his bookkeeper. I think the man who succeeded me as bookkeeper was Mr. Crosby."

(Testimony of Edwin Adams Wasserman.)

Cross-examination.

"I was in the employ of Mr. Harvey from 1895 to 1908. After 1907, I helped him, but received no compensation for it. My present occupation is that of Secretary of the Pacific Company, owners of the Pacific Building. I have been in that place since I have left the employ of Mr. Harvey and the Martin Estate, in January, 1907. I am a bookkeeper and understand thoroughly the science of bookkeeping. In making these entries I entered them according to my own knowledge of bookkeeping. Mr. Harvey did not tell me how to make each and every entry that I made. Sometimes he gave me the check-book to make entries from, sometimes memoranda. As to the entries of the Shore Line Investment Co. stock my recollection is that he gave me a lead pencil memorandum."

Mr. WHEELER.—Q. "On each of the several occasions?"

A. "Yes, I cannot say positively on each occasion, but I am sure there were memoranda given."

The witness then further gave testimony as follows: "I do not remember the contents of the pencil memorandum. The cash-book would show that. There would be an entry in the cash-book of so much money paid out for something."

There was then introduced in evidence the testimony of the witness given before the Referee in Bankruptcy. This [101] testimony was substantially as follows:

"I kept Mr. Harvey's books from December, 1906,

(Testimony of Edwin Adams Wasserman.)

until three and a half years ago. I had a conversation with Mr. Harvey in regard to his books and the status of his business affairs. I identify this letter as the one which I wrote to Mr. Harvey in regard to his accounts and know generally what it contains. I don't distinctly remember the exact occasion when I wrote it, but I undoubtedly did write that letter, because it is dated at my residence, and I recognize the subject matter of the letter as being my work. I presume I did have a conversation with Mr. Harvey prior to the time when I wrote this letter in regard to his books. I think I wrote the letter in response to a request from Mr. Harvey to render an account of the status of his affairs at that particular time. I have no recollection of what was said by Mr. Harvey to me prior to the writing of the letter. I think that I discussed the letter with Mr. Harvey subsequent to its writing, and told Mr. Harvey that in view of his condition something should be done to reduce his liabilities and interest charges; he had no suggestion to make in regard to the letter. My conversation did not touch the condition of his affairs as regards solvency, but I recommended that he reduce his liabilities. After the fire, Mr. Harvey's income properties were substantially reduced in so far as his real estate was concerned and it required about a year and a half to rehabilitate them. I took care of Mr. Harvey's property interest at that time as he was very busy with the Ocean Shore. The mortgages remained, and I naturally suggested that his idle assets be turned into ready cash to apply on this indebted-

(Testimony of Edwin Adams Wasserman.)

ness in order to reduce interest charges. It took about a year and a half to rehabilitate this property, and it was then rehabilitated; the letter was written about that time when the rehabilitation was about complete and this was a general summary of his [102] affairs made with the idea of showing exactly where he stood. I note the summary designated in this letter as a summary of assets and that I have included in there the value of the Shore Line Investment Company's stock; I think that Mr. Harvey and I had some conversation in regard to that matter, but I cannot remember it distinctly; I was very busy at the time attending to Mr. Harvey's as well as Mrs. Harvey's affairs and also entering my new business as Secretary of the Pacific Company; I cannot remember any particular distinct conversation, but I have a very good recollection of it, not a decided recollection, but a distinct one, that Mr. Harvey mentioned to me at sometime or other that this property of this Shore Line Investment Company was Mrs. Harvey's property, exactly when, I could not tell you, because I don't know, it is just a recollection; it is not distinct as to time, and I cannot tell you where it was at all, nor the place, nor anything further than that there was some such subject matter mentioned by Mr. Harvey.

"I turn to page 44 of Mr. Harvey's ledger, Shore Line Investment Company; I opened that account. The entry dated April 13, 1907, is the last in my handwriting. I have no notation among the accounts in

(Testimony of Edwin Adams Wasserman.)

that ledger of any gift of that stock to Mrs. Harvey. It certainly was my custom to make notations of that character when I learned the fact. Furthermore, in the ledger is an account of Family Gifts & Allowances, which is a statement of the gifts and allowances made by Mr. Harvey during the time I kept his books as far as I know. There is nothing appearing in that account showing any gift or allowance of this stock to Mrs. Harvey. I opened and kept both accounts. I received very little direction from Mr. Harvey when I opened the account of the Shore Line Investment Company in relation to his books; he left that entirely to me, and I simply rendered [103] statements to Mr. Harvey. It was necessary for me to know certain facts before I could enter them on the books, and when I *open* this account of the Shore Line Investment Company I knew Mr. Harvey had acquired stock in that company, the amount thereof, the book value to be placed upon it and all those facts.

I think I received knowledge of the first transaction at the time Mr. Harvey purchased the first block of Shore Line Investment Company's stock; he brought in to me a little pencil memorandum and I think he said 'put this on record.' He entered the dummy stub in the check-book showing that, and naturally I put it on his books. He gave me the pencil memorandum for one purpose, obviously so that I could, by knowledge of his business, make the entries in his books. I have no distinct recollection of what he said, but have an indistinct remembrance, to the effect that this Shore Line Investment Company

(Testimony of Edwin Adams Wasserman.)

stock was Mrs. Harvey's. It was my practice to enter gifts to Mrs. Harvey under the head of Family Gifts and Allowances. I made such an entry in regard to the Pacific Avenue lot, but not exactly at the date the gift was made. I made the entry at the close of the year but the property was purchased in January. In the letter I wrote in relation to the Santa Cruz Beach Company's stock I have specified the particular property given to Mrs. Harvey as 'less half given to Mrs. Harvey,' and made the same notation in relation to some Tonopah stock, but I find no such entry in regard to the stock of the Shore Line Investment Company. I cannot say distinctly that at the time I wrote that letter I was not aware of the fact that Mrs. Harvey had any interest in that stock; if I had known that it was Mrs. Harvey's I presume that I would have noted it in my letter just as I did in the other cases. In the cash-book under date of September 9, 1905, a pencil memorandum appears opposite the words Shore Line Investment Company, [104] 'property of S. G. H.' also on page 27 opposite Shore Line Investment Company and a like entry on page 35 and page 41; these books were accessable to me at the time I made my statement to Mr. Harvey. The pencil entries are not in my handwriting, but in the handwriting of Mr. Harvey. If those entries had been in the book at the time I made up this statement I might have seen them and I might not."

The witness then further testified upon cross-

(Testimony of Edwin Adams Wasserman.)

examination in answer to questions by Mr. Wheeler, as follows:

"I now have a clearer memory with regard to Mr. Harvey's conversation with me about the Shore Line stock."

To a question calling upon the witness to relate this conversation, counsel for plaintiff objected upon the ground that it was a self-serving declaration. The objection was overruled and the witness testified:

"At the time the assessment of the stock was paid, —I do not know the exact date, but it would show in the book,—I remember distinctly about asking Mr. Harvey about a receipt or entry for that assessment, and he told me that Mrs. Harvey—she, I think, was away at the time—that when she came back he would have the receipt entered on the stock. It was my habit when Mr. Harvey paid an assessment, to have the receipt entered on the back of the stock. Mr. Harvey told me that Mrs. Harvey had possession of the stock at this time when the assessment was paid. This date was April 13th, 1907. I made the entry on page 44 of Mr. Harvey's ledger showing the payment of this assessment.

"I remained in Mr. Harvey's employ until about the middle of 1908, and I presume I kept the books to the last. I was succeeded by Mr. Crosby. I am quite familiar with his handwriting, and the entries in the books not in my handwriting are all in his,—in the accounts I have testified to, [105] 'Family Gifts and Allowances and Shore Line Investment Company.' While I was in Mr. Harvey's employ I

(Testimony of Edwin Adams Wasserman.)

had access to his safe where he kept stocks and bonds and papers of that character. We had two safes at that time, in his office, one was a personal safe of Mr. Harvey's and the other was the safe of the Martin Estate. At all times, commencing with 1905, I had access to all compartments of Mr. Harvey's safe, except one compartment which was held by a friend of Mr. Harvey's who was in the office. All the rest of the safe was used by Mr. Harvey. I also went quite frequently to Mr. Harvey's safe deposit box."

(Objected to by the plaintiff on the ground that it is irrelevant, incompetent and immaterial and that it is not proper cross-examination. Objection overruled.)

"I went there a great many times for the purpose of checking up the assets in that box. This box was in the First National Bank at Bush and Sansome Streets. During each year at least, that I was in Mr. Harvey's employ, I went to this box and checked up the securities. At the time of the San Francisco Fire I went up to the office in the Columbian Building, opened the safe and gathered up all our securities and papers that I thought were valuable. I took them down to an automobile which I had at that time, and out to Mr. Harvey's house. One block of papers I carried around for some time in a wallet, on my person, as I did not know whether Mr. Harvey's house would burn or not. This was the wallet within which Mr. Harvey had his securities, insurance policies and other valuable papers."

(Objected to by plaintiff irrelevant, incompetent

(Testimony of Edwin Adams Wasserman.)

and immaterial. Objection overruled.)

"I never saw any stock of the Shore Line Investment Company in Mr. Harvey's custody, either in his office safe, or in his [106] safe deposit box, or at the time that I took his securities to his house. At no time between the year 1905, and the time that I left Mr. Harvey's employ in 1908, did I see any certificates of stock of the Shore Line Investment Co. in the custody or control of Mr. Harvey."

There was then shown to the witness the cash-book of J. Downey Harvey and his attention was called to an item under date September 23, 1905, "Shore Line Investment Co.," after which there appeared in pencil the words, "property of S. G. Harvey." The witness testified that the words "property of S. G. Harvey" were in Mr. Harvey's handwriting, and then further testified:

"Mr. Harvey did not frequently go over his books. This entry is an item which I would go over in making up my monthly statements of trial balances. I have no idea when the particular entry was made. I do not know whether it was made before I left Mr. Harvey's employ or not. I never saw it. I never looked back over that account because when the cash is written up that is the end of it; the trial balances are made from the ledger not from the cash-book."

Redirect Examination.

"I testified that at some indefinite period of time I had examined the papers in Mr. J. Downey Harvey's safe and also the papers in his safe deposit box, and shortly after the fire I carried around for a

(Testimony of Edwin Adams Wasserman.)

week in a red wallet the valuable papers of Mr. Harvey. I did not make these entries because of the examination of the various papers of Mr. Harvey, which I made at that time. It was not because of those facts that in my letter of September 22, 1907, I included the stock of the Shore Line Investment Company as one of Mr. Harvey's assets." [107]

[Testimony of James W. Crosby, for Plaintiff.]

JAMES W. CROSBY, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

Direct Examination.

"I was the bookkeeper for J. Downey Harvey from the spring of 1908, until practically the present time. I made an entry in the journal under the head of 'Family Gifts and Allowances,' as follows: 'To Shore Line Investment Company, $23610.00 transfer to Mrs. S. G. H. of S. L. I. Stock. J. D. H. states this stock was originally purchased for Mrs. H.'"

Mr. WHEELER.—"I take it that this line is being excepted to. Mr. Harvey's declarations subsequent to the time of the alleged gift are not evidence against his wife."

Mr. SCHLESINGER.—"That is all right."

The COURT.—"I understand that if there are any new grounds you may suggest them as you go along."

The witness then continued: "The entry is made under date of March 31, 1910. I could not say that it was made on that day, but I should say within a

(Testimony of James W. Crosby.)

year of that date, either preceding or subsequent to it. I made this entire entry at my own volition and not at the request of any person, but in accordance with the facts of which I was cognizant. It was about the time that Mr. Harvey's bankruptcy proceedings were pending, and he asked me to make up a statement for him during the time I kept his books; that is about the only time he ever asked me to make up a statement, and I wanted his books to show the exact condition of his affairs. I do not know that I have ever discussed this particular entry with Mr. Harvey. Some time prior to that date he asked me to make a note in the ledger at the head of that account, that this stock belonged to Mrs. Harvey. I do not recall the exact date, but I think it was several years prior to the time I made this entry. [108] I made this entry in 1910 and entered his employment some time during the year 1908. He did not ask me to make that entry. I made that entry while in his employ,—well, I was not exactly in his employ. That is, I never received any salary from him for keeping his books. I was at that time auditor and assistant secretary of the Ocean Shore Railway Company. I was also assistant secretary of the Shore Line Investment Company. Mr. Harvey was president of both these corporations and I was paid a salary by both these companies. I did not receive any instructions whatsoever with respect to this particular entry before making it. The entry was made to wipe the amount off his books in accordance with a statement or request made some time before

(Testimony of James W. Crosby.)

that I make a notation at the head of the account in the ledger covering the stock of the Shore Line Investment Company, that the stock did not belong to him. On one occasion, prior to the time I made that entry, I went over with Mr. Harvey, his assets and liabilities. I testified before the Referee in Bankruptcy, in the bankruptcy proceedings of Mr. Harvey, to the effect that I had gone over with Mr. Harvey the book accounts of all his assets. The only account that Mr. Harvey was interested in to any extent was his cash account, which was balanced from month to month. The other books I had at my home and possibly a year would elapse before I would make any entry in them. He would give me memoranda from time to time from which I would make entries, and any entries that were necessary I made in accordance to such memoranda. He instructed me, prior to March, 1910, to make an entry of this gift to Mrs. Harvey. I cannot say positively when, but at some time during 1908 or 1909 he gave me instructions to note at the head of the Shore Line Investment Company account, in the ledger, that the stock belonged to Mrs. Harvey. I cannot point out in Mr. Harvey's journal any entry of this transaction [109] which I made prior to the year 1909.

"I kept Mr. Harvey's trial balance-book. The first one which I entered was October 31, 1909 and the date of the last was August 31, 1911. I entered in this trial-balance book, referring to ledger folio 44, Shore Line Investment Company's stock under date of October 31st, 1909, on the debit side $26,110,

(Testimony of James W. Crosby.)

and under date of March 31st, 1910, in the debit column of the same ledger folio and heading I entered $2,500. The trial balance of October 31st, 1909, was the first that I took; the sum of $26,110 was the balance shown in the ledger prior to the time that I made the entry transferring Mrs. Harvey's stock to the Family Gifts and Allowance account; the balance for $2,500 was the amount appearing in the ledger representing stock which Mr. Harvey himself owned. The only balance sheet which I really discussed with Mr. Harvey was at the time I made up his books in 1911, when bankruptcy proceedings were pending. I did not go over Mr. Harvey's accounts with him, to any extent, prior to 1910. The trial-balance book I think I had at my home. Whatever work I did in it was in the evening or on Sundays. I had his ledger, journal, cash-book and trial-balance book at my home for several years. I did not go over these books with him until a comparatively short time ago. Any entries which I made in these books, except ordinary bookkeeping entries, were taken by memoranda given to me by Mr. Harvey, or from information which he gave to me verbally from which I made memoranda. I do not know that I had talked to Mr. Harvey on the subject of this stock before I made the entry appearing in the trial-balance book, ledger folio 44, debit, Shore Line Investment Company, $26,110; I presume it was prior to that time that he directed me to make the notation at the head of the account in the ledger. Mr. Harvey never gave me any written

(Testimony of James W. Crosby.)

memoranda to make the transfer of this stock to Mrs. Harvey. He instructed me [110] verbally to make a notation at the head of the account. All my information upon the subject was obtained from Mr. Harvey. Under the caption, 'Family Gifts and Allowances,' under date of March 31st, 1910, I made the entry 'S. L. I. Co. Stock $23,610.' The abbreviation refers to the Shore Line Investment Company. Mr. Harvey did not hand me any memorandum before I made this entry. I had no independent information with respect to the matter but obtained all my information from Mr. Harvey. It is not correct that I dated these entries on March 31st, 1910, because I got the information on that day."

Counsel for the plaintiff then offered in evidence page 162 of the ledger of J. Downey Harvey. This was objected to by counsel for the defendant S. G. Harvey upon the ground that it was *res inter alios acta,* or hearsay, immaterial, irrelevant and incompetent, which objection was overruled.

The witness then further testified: "Referring to my testimony before the Referee in Bankruptcy regarding these entries, I said that they were made at approximately the date they bear date. In Mr. Harvey's journal on page 58, under date of March 31st, 1910, I made the entry, 'Family Gifts and Allowances. To Shore Line Inv. Co. Transfer to Mrs. S. G. H. of S. L. I. Stock. J. D. H. states this stock was originally purchased for Mrs. H.' As I testified before here, I think it was within a year.

"In my examination before the Referee in Bank-

(Testimony of James W. Crosby.)

ruptcy I was asked the question 'I call your attention to the entry on page 58 of the Journal, March 31st, 1910, Family Gifts and Allowances, to Shore Line Inv. Co. transferred to Mrs. S. G. H., S. L. I. Co. Stock. J. D. H. states that this stock was originally purchased for Mrs. H.' That entry was made approximately on the day it bears date, was it not, March 31st, 1910? And I gave the answer 'I should say that it was.' My recollection on the subject is not a bit better to-day than it was when I testified [111] before the Referee. I made the entry on page 44 of Mr. Harvey's ledger, reading 'March 31st, 1910, F. G. & A. (meaning Family Gifts and Allowances) 546 shares $23,610.' That entry was made within a comparatively short time after that date. By comparatively short time I mean within a year, although it might have been within the month, I don't recall exactly. In testifying before the Referee in regard to this entry in the ledger I was asked the following questions and gave the following answers: 'Q. Was that entry made when it bears date? A. About. Q. About the date it bears date, and it bears the same date that the journal entry bears, does it not? A. Yes, I stated. Q. Then it was made on the day it bears date? A. Yes, unquestionably.' Did you give that answer 'Yes, unquestionably'? I am not sure that I used the word 'unquestionably' I might have said approximately, but I did give the answer yes. My recollection at that time was as good as it is now.''

Mr. WHEELER.—"I think we are wasting a

(Testimony of James W. Crosby.)

good deal of time over this. There is no contention upon our part that there were any entries prior to the date upon which they appear in the book; what difference does it make? We will admit that they were made upon the dates they bear, if counsel desires; it will save a lot of time in running it down; as to whether it was, is certainly immaterial to us."

The witness then further testified: "All of these entries as to which I have been testifying, although they may not have been made on March 31st, 1910, were made at approximately the same date. My work on the books sometimes ran more than six months behind. I think there was one occasion on which I had about 18 months work to do. I had [112] ten years experience in Bookkeeping before entering the employment of the Ocean Shore Railway Company."

Counsel for plaintiff thereupon offered in evidence the following items from the trial-balance book of J. Downey Harvey:

February 1906	$18,150.00
November 1906	18,150.00
December 1906	18,150.00
February 1, 1907	18,150.00
February 29, 1908	23,610.00

all bearing opposite the words, "Shore Line Investment Company."

Counsel for the defendant S. G. Harvey thereupon renewed his objection to the introduction of this evidence, which objection was overruled by the Court.

(Testimony of James W. Crosby.)

Cross-examination.

"I made all of the several entries referred to at approximately the same time; within a few days. The entries made under date of March 31st, I think were made within a few days of that time. I was not familiar with the fact that this stock was transferred to Mrs. Harvey in 1909, and knew nothing about that. At any rate, they were made subsequent to November 26, 1909. I knew nothing about the transfer of the stock upon the books of the corporation.

"In the spring of 1908, Mr. Harvey asked me if I would look after his books; that Mr. Wasserman was too busy to do so and after that I kept them. I had them at my home in order to make the entries necessary in the evening and on Sundays. I was very busy during the day, and did not feel much like working in the evening. Consequently, I left them go for long periods without making any entries at all. Mr. Harvey was interested only in his bank balances, and his check-book was at the office, and I checked his bank balance monthly. That was practically the extent of the work I did for him beside the comparatively few entries I made in his general books." [113]

Mr. SCHLESINGER.—"I submit the books are the best evidence. I have no objection to the books going in evidence. I was going to suggest to Mr. Wheeler that it seems to me that the best proof as to how those books were kept and as to whether they were kept as bookkeeping is usually performed,

(Testimony of James W. Crosby.)

would appear from the books themselves; and I have no objection,—not that I insist upon it,—that these books may be taken and examined by his Honor."

Mr. WHEELER.—"I have not the slightest objection to that; I am perfectly willing that his Honor should examine them if he desires."

The witness, on cross-examination, then further testified:

"His transactions were comparatively few. There was an entry in the cash-book for every transaction performed by cash, the passing of cash or a check. There were very few entries aside from the cash-book. Mr. Harvey kept a check-book with a stub on which the transactions were entered. I used the stubs in entering up the cash. During the time the books were at my home, they were not examined by, or exhibited to, anyone except myself. I never showed them to any creditor of Mr. Harvey's, and was never asked to show them.

"The occasion on which Mr. Harvey spoke to me about making an entry on the books that this stock belonged to Mrs. Harvey, was not the first time I heard from him that she owned the stock. I was in the employ of the Shore Line Investment Co. at the time that the assessment was paid in 1907. I had a conversation with Mr. Harvey at this time."

To the testimony of this conversation, counsel for plaintiff objected as irrelevant, immaterial and incompetent and not proper cross-examination, and a self-serving declaration. The objection was over-

(Testimony of James W. Crosby.)

ruled by the Court, and the witness [114] continued:

"I do not remember the exact conversation, but he brought me a check in payment of the assessment. He told me at that time that it was to pay the assessment on Mrs. Harvey's stock, that Mrs. Harvey was away at the time and consequently he could not get the certificates, but he would bring them to me later to have the notation 'assessment paid' stamped or written on the back of the certificates. This was done at a later day. I do not recall how long afterwards. I do not recall Mr. Harvey's wording, but I understood that the stock belonged to Mrs. Harvey. I do not know whether he said the stock belonged to Mrs. Harvey in so many words or not. He told me the stock was Mrs. Harvey's at that time. Not I, but Mr. Wasserman was his bookkeeper at this time. I was the auditor and I think the assistant secretary of the Shore Line Investment Company at that time. At any rate I kept the books."

Mr. WHEELER.—Q. "What, if anything, did you have to do with the stamping of the payment of assessments upon the stock?"

A. "I did not have anything to do with that, I think—it was customary for me to have Mr. Harvey sign the receipt of the payment of the assessments as president of the company—I received the money."

Q. "You received the money for the company?"

A. "For the company."

Q. "And did you make entry in the assessment-

(Testimony of James W. Crosby.)

book of the payment of assessments?"

A. "I think I did—yes, I know I did. I did."

Redirect Examination.

"My recollection is that the check given in payment of the assessment was Mr. Harvey's check. I presume that I gave him a receipt for it." [115]

[Testimony of Robert Finn, for Plaintiff.]

ROBERT FINN, a witness called on behalf of plaintiff, after being duly sworn testified as follows:

Direct Examination.

"I am the Superintendent of the Safe Deposit Vaults of the First National Bank, and have charge of the boxes. I have with me some records showing admissions to the safe deposit boxes of Mrs. J. Downey Harvey from June 1st, 1905, to December 31st, 1905."

Mr. WHEELER.—"I would like to know the purpose of counsel in offering this evidence. Counsel is undoubtedly entitled to this evidence in the course of the trial, but it is not coming in its regular order. If a question arises as to the veracity of Mrs. Harvey the claimant of this stock, that is evidence; anything which will throw light upon that subject your Honor is entitled to, and there will be no opposition on our part to the fullest investigation, but the proper order of proof is that this testimony should come in the form of rebuttal of the truth of Mrs. Harvey's testimony."

The COURT.—"The testimony does not seem to

(Testimony of Robert Finn.)

be in its order, but that is something that I am not insisting upon."

The witness was then requested to read all entries showing these visits.

On cross-examination by counsel for defendant S. G. Harvey, relative to the records, the witness testified:

"When a customer visits his box, either in person or by an order, it is the rule to make an entry on our books. There are five employees in the safe deposit department. One man does the unlocking of the boxes, and has the master key. Some customers write their name upon a ticket, some don't. When the name is written, the ticket is kept. When the customer does not write the name an entry is made. It is our effort to [116] make a record, as near as possible, of everybody who goes in. I do not know of any omissions in the record since we went into the new place. We have a better system there than in the other. The other system was not so correct. In 1906 we were at the old place."

Mr. WHEELER.—Q. "At the old place; so that whatever records made relate to the year 1905 or 1906, the records made at the old place where your system was not so correct—that is true, isn't it?"

A. "We tried to get them all."

Q. "But you have known of many omissions there, have you not?"

A. "I don't know; we tried to get them as near as possible."

Q. "But you have known of omissions, have you

(Testimony of Robert Finn.)

not?" A. "Yes, probably, there was."

The witness then further testified: "When a customer changes from one box to another, we now note the change upon our books and require a new signature."

Counsel for plaintiff thereupon offered in evidence the books Nos. 51, 52 and 53 of admissions to the First National Bank's safe deposit vaults.

To this evidence counsel for defendant S. G. Harvey objected upon the ground that it was immaterial, irrelevant and incompetent, and *res inter alios acta hearsay,* and upon the further ground that it appeared from the testimony of the witness that the books were inaccurately kept, and that the evidence was inadmissible as a matter of substantive evidence, and inadmissible to impeach the testimony of the witness. No objection to the evidence was offered on the ground that the original books were not produced. The objection was overruled by the Court. [117]

Mr. SCHLESINGER.—"I expect to show from these books, and the books do absolutely show that Mrs. Harvey did not visit the safe deposit vaults or gain admission to that box at any time during the month of June, 1905; I expect to show that she did not gain admission to that box at any time during the month of August; I expect to show—"

The COURT.—"Of the same year?"

Mr. SCHLESINGER.—"Of the same year, your Honor. That she did not gain admission to that box at any time during the month of September. I will

(Testimony of Robert Finn.)

furthermore show from those books, the same year, between June 1, 1905, and December 31, 1905, that Mrs. Harvey did not inspect, examine or visit her box at all. I will show that there were three admissions to that box during that time, and only three admissions, one admission on Saturday, July 15, 1905, when Lizzie Anderson, Mrs. Harvey's maid inspected the box at 4:52 P. M. and left at 4:56, on an order of Mrs. Harvey; that the next visit was on July 17, 1905, when Lizzie Anderson, Mrs. Harvey's maid, again visited the box at 5:02 P. M. on Mrs. Harvey's order; and the next visit during those six months was on November 8, 1905, when Lizzie Anderson visited the box at 4:15 P. M. and left at 4:34 P. M. on an order."

The witness then stated that the books offered in evidence contained the record of admission to the safe deposit box at the First National Bank Vaults between June 1st, 1905, and December 31st, 1905.

Mr. WHEELER.—"We make no claim that the stock was left in the safe deposit box."

The WITNESS.—"Mrs. Harvey changed her safe deposit box on July 31st, 1911; she changed it before that on May 25th, 1905."

Counsel for plaintiff then offered in evidence testimony of Mrs. S. G. Harvey given before the Referee in Bankruptcy. To [118] the admission of this evidence counsel for the defendant S. G. Harvey objected as immaterial, irrelevant and incompetent, and not responsive to any issue in the case, and upon the further ground that it was in the nature of rebuttal

testimony, if anything, and upon the further ground that Mrs. Harvey was not upon the witness-stand to be confronted with the testimony. The objection was overruled by the Court.

The testimony of Mrs. Harvey before the Referee in Bankruptcy was then read into the record, and was substantially as follows:

[Testimony of Mrs. S. G. Harvey Before Referee in Bankruptcy.]

"In 1905 Mr. Harvey told me he was going to give me some stock in the Shore Line Investment Company and he gave me in June of that year 300 shares. He told me as he acquired more he would give it to me. The reason that he kept the shares in his own name was because he was a big holder in the Ocean Shore Railway Company and that would show his interest in the Shore Line Investment Company, if he kept them in his name. In August he gave me 66 shares. In September he gave me 160 shares and 20 shares, and I put them in my box. In 1906 Mr. Harvey asked me for the certificate for 66 shares in order to make Mr. Folger a director of the Company. In 1907, Mr. Harvey wrote me, I was then in New York, there was an assessment on the Shore Line Investment Company of $10 which he paid and when I returned in July I gave him the certificates and he had the assessments endorsed on them. In December, Mr. Folger went out of the directorship of the Shore Line Investment Co. and I got the certificate endorsed by Mr. Folger, and gave it to Mr. Harvey. He gave me another one endorsed by himself and I

(Testimony of Mrs. S. G. Harvey.)

put it in my box. Mr. Harvey gave me the stock in the respective months that I have named in 1905; I mean by that he gave me the certificates. The certificates in form were like common certificates, and they were endorsed by Mr. Harvey. [119] I put the certificates in the safe deposit of the First National Bank, where I always have a box. I remember the dates on which these certificates were given me, because I put them down on a memorandum."

Mr. SCHLESINGER.—"Mr. Wheeler, will you admit that this was a memorandum handed to Mr. Williams by Mrs. Harvey?"

Mr. WHEELER.—"I will admit that Mrs. Harvey copied off these numbers and that it was handed in the course of your proceedings in bankruptcy; that is true; but this is not the memorandum which Mrs. Harvey referred to in her testimony at all."

The further testimony of Mrs. Harvey, before the Referee in Bankruptcy was then read into the record, and was substantially as follows:

"In December, 1906, Mr. Harvey stated he wanted the stock certificate for 66 shares to make Mr. Folger a director. I went to my box and got the certificate and gave it to Mr. Harvey. I received it back again endorsed by Mr. Folger's name and put it in my box."

"The first of these certificates was given to me in June, 1905. The only discussion I had with Mr. Harvey was that as he acquired the stock he would give it to me. He actually delivered me a certificate of stock at that time and he said I was to take it and

(Testimony of Mrs. S. G. Harvey.)

put it in my box and I took it at that time and put it in my box. I am sure that the date was June, 1905.

"I understand, at the time I gave Mr. Harvey the certificate to make Mr. Folger a director, that I was placing it out of my power for a day or so. Mr. Folger remained a director until 1907, but I received the certificate back immediately and put it in my box. It was endorsed by Mr. Folger's name. The stock stood in Mr. Folger's name while he was acting as a director, but I had the endorsed certificate in my safe deposit box. [120]

"I knew that Mr. Harvey was president of the Shore Line Investment Company at all the times I have mentioned, and was taking a very active interest in the Company's affairs. Mr. Harvey had no interest in the Shore Line Investment Company outside of what I have stated.

"As a matter of fact, I delivered all those shares of stock according to Mr. Harvey's directions. There was not much direction given me, but I was at all times willing to act in accordance with his suggestion. I never repaid Mr. Harvey the amount he advanced for assessments, because he never asked me. He said it was a gift along with the others. I never had any discussion with Mr. Fay in regard to the Shore Line Investment Company. Never spoke to him about it in my life. Mr. Harvey told me Mr. Fay was to manage at Granada. He never told me anything else about him. Mr. Harvey never asked me for possession of my stock so that he could deliver it to Mr. Fay. He never asked for the posses-

(Testimony of Mrs. S. G. Harvey.)

sion of the stock at any time except for Mr. Folger, and except that in 1909 he asked me for the stock again because there was a second assessment.

"Mr. Harvey told me that since I was the owner of the stock the bank absolutely demanded that I should sign the note. He said that since I was the owner and holder of the stock he deemed it advisable to have it put in my name, and therefore he had it put in my name. Up to that time he had always appeared on the books of the corporation as a stockholder. I always knew that the stock stood in Mr. Harvey's name on the books of the corporation and was familiar with the fact that he was acting as president of the company and was managing its affairs. I was cognizant of the fact that there had been an assessment on the stock, but never made any offer to return that money to him." [121]

TESTIMONY JANUARY 5, 1912.

"I had a safe deposit box in 1905, during the entire year, in the First National Bank. That was the only safe deposit box that I had anywhere. I had the same box during the years, 1906, 1907, 1908, 1909, and 1910, and only had that single safe deposit box during any of that time. The box was in my own name. At one time Miss Ella Smith had access to it, but no one else. She has not access to my box at the present time.

"I kept in my box letters and things of that sort. Sometimes shares, sometimes not. I did not have any shares of stock of the Shore Line Investment Company in that box during the year 1905. I made

(Testimony of Mrs. S. G. Harvey.)

a mistake in my testimony that is the reason I want to correct it. I never had any shares of stock of the Shore Line Investment Company in my box at any time. I kept that stock in my own safe. I had other papers during the years from 1905 to 1910, but I don't think I had any other shares of stock in the safe deposit box. I had more my letters and jewels there. I don't think I had anything else of value. I can't answer.

"During the years 1905 to 1910 I lived at 2555 Webster Street in San Francisco and that was my only residence in the State. I have frequently traveled. I don't remember whether I left San Francisco for a long period of time during the year 1905. During 1906 I spent from April until the following July or August in Europe, in France. I had the Shore Line Investment Company shares in my possession prior to my departure for Europe. I did not take them with me. They were in my safe during my absence. My safe was at home. I have not the same safe to-day. I have changed safes and I cannot tell you the date of the exchange, but I always had a safe. I believe I changed safes in 1907 when my daughter, Mrs. Cooper, was married. I gave her my safe and bought another. While I was in Europe these [122] shares rested in my first safe. My maid had access to the safe I have now. They were both combination safes. My husband never had access to these safes. I was living with him in the same house, but nothing that belonged to him rested in that safe. His will was in my safe deposit

(Testimony of Mrs. S. G. Harvey.)

box at the First National.

"I went to Monterey during the year 1907 and took the safe with me, and lived there until the end of 1907; from September, 1907, on. Altogether I lived there nearly three years, only coming to San Francisco occasionally. Mr. Harvey visited me at Monterey occasionally. He never had access to my safe.

"All my different papers rested in my safe at Del Monte, whatever papers I had. I took some of my jewelry with me to Monterey and it also was in that safe. All my valuable papers, evidences of ownership in corporations, shares of stock and other valuables, including my jewelry were put in this safe and not in my safe deposit box in the First National Bank, except that there was a little antique match box belonging to my uncle and some antiques in my safe deposit box. The letters in my safe deposit box were of no particular value; just personal letters that I used to keep. To sum the matter up briefly, the safe deposit box which I kept and paid for during the years 1905 to 1910, inclusive, contained nothing of value aside from this antique match box and some letters of little value.

"On December 19th, after I gave my testimony under examination of Mr. Williams, I wrote him the following letter.

" 'San Francisco, December 19, 1911.

E. H. Williams, Esq.,

San Francisco, California.

Dear Sir:—

If you wish to learn from the safe deposit company

(Testimony of Mrs. S. G. Harvey.)

the dates on which I visited my safe deposit box, I have no objection whatever, and am perfectly willing that the bank officials shall give you the information, and you may tell them so for me. I do not myself know the exact dates of my visits. I have, of course, been there a number of times since 1905; but I have at all times had a safe of my own wherever I have been living, whether here or at Monterey, and I kept many of my papers in [123] these safes, and, as I think it over, I am positive I kept my certificates of stock there instead of in my safe deposit box. I also forgot for the moment and omitted to tell you when on the witness-stand, of the sale by Mr. Harvey to me of 200 shares of Philippine Telephone & Telegraph stock in March, 1910. This stock was worth about $20 per share, and the transfer to me was a part of the same transaction whereby I purchased the Visitacion Valley Lots, the Beach Company's stock and other property enumberated by me in my testimony, but this Philippine stock had slipped my mind and I forgot to mention it. Should you, or Commissioner Kreft, wish me to correct my testimony in these particulars, I will, of course, do so gladly.

S. G. HARVEY.'

"I sent that letter to Mr. Williams. By the statement in that letter that I have 'of course been there a number of times since 1905.' I mean that I was putting in and taking out things that I wanted. The articles in there were of little value, but I from time to time put them in and took them out. The things

(Testimony of Mrs. S. G. Harvey.)

that I put in that box were not papers or documents of value or shares of stock, but more my personal things, my jewels, my jewels were not worth mentioning, but I put them in and took them out as I felt like it.

"I did not take the stock of the Shore Line Investment Company with me to Paris, but I did take it to Monterey, because I knew that I could not leave my old mother, who was down there with me, and thought it was safer and nicer and better there. I was going to Monterey for my home. I was an invalid when I came from Europe and I had to go to Monterey for absolute rest, and I thought it was much easier to take all of my things with me. It was easier by far than going to town for things that might be needed. During my visit abroad this stock rested in my safe in Webster Street. I didn't care to put it in my safe deposit box. It was my wish to leave it in my safe.

"Mr. Harvey personally collected the dividends on the stock of the Shore Line Investment Company. I had a bank account during 1905, 6 and 7, during some portion of these years and in 1908 and 1909 at the First National Bank. Mr. Harvey made deposits in the bank for me during those years, but had no power to draw on that account. The dividends from the Shore Line Investment Company were deposited in that bank account. I [124] received $21.00 a share, amounting to some eleven or twelve thousand dollars, at approximately the dates the dividends were declared. Mr. Harvey had no

(Testimony of Mrs. S. G. Harvey.)

power of attorney from me and no letter. He just collected the dividends and put them in my account. During those years I drew checks to Mr. Harvey's order on that particular account. I received my first certificate of stock in the Shore Line Investment Company in June, 1905. I have a memorandum of those dates which I now hand you. This memorandum shows that on June 26, 1905, I received 300 shares of stock in the Shore Line Investment Company. I received these shares from Mr. Harvey. He delivered them to me on Webster Street and I thereupon put them in my safe. I never took that certificate out of that safe until I exchanged my safe, except that Mr. Harvey had the certificate in 1907.

"I never asked to have these certificates, which Mr. Harvey gave me, transferred in my name until November, 1909. Mr. Harvey applied to have the transfer made, I did not.

TESTIMONY JANUARY 11, 1912.

"The safe which I took to Monterey was a little bit higher than my lap. I should say about two and a half feet in width, or about the size of this chair. Maybe a little bit higher and not quite so large. It was a regular iron safe. I alone had the combination to the safe and kept it in my room. During my absence in Europe, during 1906, my house was occupied by my mother, my daughter and my husband, but none of them had the combination to my safe. The stock was in the safe during that time. Lizzie Anderson was my maid during 1906; she had the combination to my safe. She frequently opened

(Testimony of Mrs. S. G. Harvey.)
the safe at my bidding."

Referring to a subsequent portion of the testimony of Mrs. S. G. Harvey before the Referee in Bankruptcy, counsel [125] for plaintiff read the following:

"During the year 1905 I did not have in my safe deposit box the shares of the Shore Line Investment Co. I made a mistake in my testimony and want to correct it. On thinking it over I kept this stock in my own safe in my house. Some keepsakes and antiques I had in the safe deposit box. My other jewels I had with me. Outside of this, the safe deposit box contained nothing really of value. The letters which I had there were personal letters which I kept, and had no particular value."

Subject to the same objection, counsel for plaintiff further offered in evidence a letter dated "San Francisco, December 19, 1911.

E. H. Williams, Esq.,

San Francisco, California.

Dear Sir:—

If you wish to learn from the Safe Deposit Company the dates on which I visited my safe deposit box, I have no objection whatever, and am perfectly willing that the bank officials shall give you the information, and you may tell them so for me."

It was admitted that this letter was in Mrs. Harvey's handwriting.

Counsel for plaintiff then offered to read into the record entries taken from the books of the Safe Deposit Vaults showing the dates of the visits of Mrs.

(Testimony of Mrs. S. G. Harvey.)

Harvey to her box, during the years, 1906 to 1912, inclusive.

To this evidence, counsel for the defendant S. G. Harvey objected as immaterial, irrelevant and incompetent and to the accuracy and completeness of the record.

Counsel for plaintiff then read into the record the following entries, which showed that Mrs. S. G. Harvey visited her safe No. 1629, at 11 o'clock A. M., of September 13, 1906; that Lizzie Anderson, her maid, visited her box December 5, 1906, at 3:50 P. M.; Mrs. S. G. Harvey visited her box at 1:19 [126] on December 14, 1906; Mrs. S. G. Harvey visited her box February 18, 1907, at 12:16; Lizzie Anderson, her maid, at 4 o'clock September 16, 1907; Lizzie Anderson, her maid, at 2:04 P. M. of August 15, 1908; Mrs. Harvey at 10:55 A. M. September 28, 1908; Mrs. Harvey again 3:43 P. M. January 20, 1909; Mrs. Harvey again 3:29 P. M. of July 15, 1909; Mrs. Harvey again 12:60 August 9, 1909; Mrs. S. G. Harvey, 12:17 P. M. April 29, 1910; Mrs. S. G. Harvey 10:27 May 11, 1910; Mrs. S. G. Harvey May 12, 1910, 11:02 A. M.; Mrs. S. G. Harvey 12:21 May 13, 1910; Miss Ella Smith, maid, July 5, 1910, 1:19 P. M.; Miss Ella Smith, maid, 8:26 P. M., July 6, 1910.

It was admitted that after giving the testimony on December 5th, there was no record that Mrs. Harvey visited the safe deposit box prior to the time of changing her testimony.

[Testimony of Edwin H. Williams, for Plaintiff.]

EDWIN H. WILLIAMS, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

"I am an attorney at law, and am one of the attorneys for the Trustee in Bankruptcy in the proceeding against J. Downey Harvey. I have been such ever since a Trustee was appointed. I was present in the office of the Referee in Bankruptcy on the 19th day of December, 1911, and was handed the letter from Mrs. Harvey, recently introduced in evidence."

To a request that he state the circumstances under which that letter was handed to him, counsel for the defendant objected as being immaterial, irrelevant, incompetent and *res inter alios acta.* The objection was overruled, and the witness further testified:

"At this time Mr. J. K. Moffitt was put on the stand and sworn as a witness, and his testimony was taken at some length, covering at least ten minutes of the hearing. When I questioned [127] him in regard to the record of Mrs. Harvey's visits to the safe deposit vaults, an objection was taken by Mr. Cushing to producing those records, and after that Mr. Harvey got up from his seat and handed me a letter, the one you speak of. The Referee on a prior occasion had announced that we were entitled to have those records exhibited, in so far as they had a bearing upon the visits which Mrs. Harvey claimed to have paid those vaults in order to deposit this stock, and the objection had been taken at this particular hear-

(Testimony of Edwin H. Williams.)

ing by Mr. O. K. Cushing, and my recollection is that the Referee had made no ruling, but he had indicated what his ruling might be."

Cross-examination.

"The letter was handed me at the hearing of December 19th, 1911. The ruling of the Referee permitting us to ascertain what time Mrs. Harvey had visited her safe deposit box in connection with the stock of the Shore Line Investment Company, had been made at an examination held before the Referee on December 6th or 7th, 1911. Mrs. Harvey was not present when this ruling was made. Mr. Cushing appeared as attorney for the corporation and made a very strenuous objection to producing the records. Mr. Moffitt was called again on December 19, 1911, and again the Company objected to producing the records. Mr. Harvey then came forward with this letter. I think Mr. Harvey had been in the room since the commencement of the proceeding, but I am not positive. He interrupted the proceeding while Mr. Moffitt was on the stand and handed me this letter."

Redirect Examination.

"Between the time when the first objection was made by the corporation to producing its safe deposit records, and the renewal of their objection on December 19th, I did not, nor did anyone with my authority request Mrs. Harvey's permission to [128] know the dates on which she had visited her safe deposit."

[Testimony of J. A. Schaertzer, for Plaintiff.]

J. A. SCHAERTZER, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

"I am a Deputy Clerk of the United States District Court, Northern District of California. I have the custody of the records of that Court, including the records of a case brought therein entitled, Baldwin Locomotive Works vs. Ocean Shore Railway. The record consists of the complaint and an order appointing a receiver."

Counsel for plaintiff thereupon offered these documents in evidence, to which counsel for the defendant S. G. Harvey, objected as immaterial, irrelevant and incompetent and as not being in rebuttal, and not being a substantive circumstance tending to impeach the testimony of any witness on the stand. The objection was overruled by the Court.

Mr. WHEELER.—"I cannot make it too clear that we admit that if this transfer by handing the certificates to Mrs. Harvey, this gift, was made in 1909, there is nothing for your Honor to do but to decide this case against us. Our defense does not hinge around 1909 at all; in other words, we contend that the transfer was made in 1905, by endorsement of the certificates."

Said complaint shows that it was filed in said Court on December 6th, 1909, in action No. 15,008; that it was verified by Charles P. Eells, and that it alleged among other things the following, that for more than six months prior to the date of said complaint the

Ocean Shore Railway Company had been wholly insolvent and unable to meet or discharge its debts or liabilities as the same came due, and that it had failed to pay the claim of the plaintiff in the case because of its insolvency and inability to obtain funds so to do. [129]

Plaintiff alleged on information and belief that in addition to plaintiff's claim there were outstanding unsecured claims and indebtedness in favor of various creditors of the Ocean Shore Railway Company in the sum of upwards $1,900,000.

It alleged that all the property, real and personal, belonging to said corporation or thereafter to be acquired by it had been conveyed by said company in trust to secure the payment of bonds for the sum of $5,000,000; that all of said bonds were issued and outstanding and constituted a first lien against all the assets of said company to the extent of $5,000,000.

It alleged that all the assets of said corporation, if presently disposed of, would not yield sufficient funds to pay the amount of its bonded debt, and the bonded debt could not be paid in full, and nothing would be left for unsecured creditors, whose claims exceed $1,900,000.

It further alleged that said corporation was engaged in constructing a railroad; that the railroad was unfinished; that the company had no funds to complete the work; that its franchises were in danger of forfeiture; that the unsecured creditors had threatened to sue the company and attach the same and that the appointment of a receiver was necessary

in order to prevent said suits and attachments and the threatened forfeiture of the company's franchise. Said complaint was signed by Goodfellow & Eels, as attorneys.

The plaintiff thereupon rested. [130]

[Testimony of J. Downey Harvey, for Defendants.]

J. DOWNEY HARVEY, a witness called on behalf of defendant, after being duly sworn, testified as follows:

"I am the insolvent referred to as J. Downey Harvey. I am the husband of the defendant, Mrs. Sophie *H.* Harvey. We were married January 11th, 1883. We have two daughters, both married. I was one of the organizers and incorporators of the Shore Line Investment Company, incorporated in May or June, 1905. Prior to the incorporation, I visited the lands subsequently deeded to the company. My wife was with me on the occasion of my first visit. In the party were James D. Phelan, Edward Tobin, Mr. and Mrs. Thomas Magee, J. B. Rodgers, afterwards chief engineer of the Ocean Shore Railroad and the man who laid the line out for the Ocean Shore Railway and A. D. Bowen, one of the original promoters and afterwards general manager of the road."

To a question as to whether anything was said on that occasion with regard to the intended incorporation of the company, counsel for plaintiff objected as irrelevant, immaterial and incompetent, not binding upon the plaintiff, and not within the issues made

(Testimony of J. Downey Harvey.)

by the pleading. The objection was overruled, and the witness continued.

"We all went over the country on a visit preliminary to my taking an interest in the Ocean Shore Railway. It was about decided that I was going into the organization of that company, and we had in contemplation besides that the acquisition of real estate along the line. It was intended as an investment or improvement land company, and I showed Mrs. Harvey where the principal holdings was to be on the north end of Halfmoon Bay, now known as Granada, and I told her we were about to acquire property there. It was to be our principal holding and I showed her later in the day, over the property [131] that we had in view. I told her at that time that I was going to give her my stock that I would acquire in that land company. After the acquisition of the land, and the organization of the company, the stock was issued to me in June, 1905, one lot, another lot in August, 1905, and two lots in September, 1905. Stock certificates were issued to me and when I received them I endorsed them and gave them to Mrs. Harvey in conformity to what I told her I was going to do. I took them and handed them to her and told her that they were the certificates of the Shore Line Investment Company; that she was interested in as I had promised her, and I told her to keep them and take care of them, that they were of value and that they were endorsed. And I said to her that the reason I am retaining them in my name is that I am very largely interested in the Ocean Shore Railroad,

(Testimony of J. Downey Harvey.)

and these two companies are associated in the development of one another, one depends upon the success of the other. If I keep this stock in my name, which I will want to do, I will show the people that the Ocean Shore Railroad is interested in the success of this land company, and that I am a large holder in it and that at all times I will be ready to help out Granada as much as we can.

"I became President of that corporation, I think, in January, 1906. Up to that time I had been vice-president, one of the incorporators, and a director. In April, 1907, I paid a $10.00 assessment on that stock. I had no conversation with Mrs. Harvey in regard to the assessment. Mrs. Harvey was east with one of my daughters and I wrote her the assessment had been levied and that when she returned I would get the stock and have the receipt entered on it. When she returned I did get the stock. I did not say anything to her regarding whether or not I would pay the assessment. When I gave her the stock no assessment was contemplated, and I naturally felt that since I [132] had given her a gift at that time, I ought to follow it up and pay the obligations that would fall on it. I did pay the assessment and wrote her to that effect to New York when she was there. My intent in paying the assessment was to make an additional gift which would naturally follow this present of stock. I told her if I acquired more stock I would give it to her, and I felt it my duty to take care of the assessment and make a gift of it as I had of the certificates themselves. The total

(Testimony of J. Downey Harvey.)

paid by me for the stock, including the assessment was $23,000 and some odd dollars, I think $650 or something like that.

"Among my present creditors there are none who were at that time unsecured. At the time I gave Mrs. Harvey this stock I was easily worth over my obligations from half a million to $750,000. In 1907 when I paid the assessment, I was worth the same amount. I did not make any other gifts to Mrs. Harvey before that time, but within a year or two afterwards, I gave her a few shares of the Santa Cruz Beach Co. The original investment there cost me $4,000.00 and I gave her half of it in 1907 as a gift. I later sold her the balance with some other properties. In the early part of 1905, I gave her a building lot on Pacific Avenue. This cost me between $13,000 and $15,000.

"After giving these certificates to Mrs. Harvey I got one of them back. Mr. Horace Pillsbury, who was a director in the Shore Line Investment Co., was in the east and I asked Mr. J. A. Folger to act as a director, he being a director in the Ocean Shore Railway Company. Up to that time we had the same directors in the two companies, which was a great convenience as we had a meeting of one company immediately after the meeting of the other. Mr. Folger was always present at the earlier meeting of the Ocean Shore Railway Company, and it was [133] easy for him later to attend the meeting of the Shore Line Investment Company. In San Francisco, after the fire, it was very difficult to secure meetings. Mr. Folger consented and I took a block

(Testimony of J. Downey Harvey.)

of 66 shares which I had Mrs. Harvey give me and placed it in his name. He endorsed this stock and returned it to me and I returned it to Mrs. Harvey. He remained with us about a year and when Mr. Pillsbury returned from the east, Mr. Folger resigned. Mr. Pillsbury was re-elected and this stock standing in Mr. Folger's name was received from Mrs. Harvey and placed by me in my name and I then returned the certificate endorsed to Mrs. Harvey.

"It was in December, 1906, that I first got this stock from Mrs. Harvey. It was transferred from my name unto that of J. A. Folger, where it remained until December, 1907, when it was retransferred into my name and was endorsed and delivered to Mrs. Harvey by me. Mrs. Harvey had Mr. Folger's certificate endorsed by him. The transfers were attended to by me. I got the certificate on each occasion from Mrs. Harvey and took it to the secretary and returned it to her. There was no other transfer of this stock between the time that I gave it to Mrs. Harvey and its actual transfer in November, 1909. At that time I had the stock in my possession, that is, I did not have it in my possession except for that purpose.

"Early in November, 1909, we were negotiating for a loan to pay off our indebtedness in the Shore Line Investment Company, and the parties that we were negotiating with made a qualification that this loan required the large stockholders, in fact, nearly all of the stockholders should sign an agreement, pledging themselves, with their stock, to meet this obligation

(Testimony of J. Downey Harvey.)

if the Company could not. I was then notified by the General Manager, that it would be necessary for me to produce these certificates of stock, as he wanted to see how much stock he could acquire [134] for this purpose. When he came to me I said, 'As you know, that is Mrs. Harvey's stock and I will have to get it from her. She is down at Del Monte and it will probably take a day or so. I will communicate with her and get the stock.' I got the stock from Mrs. Harvey and turned it over to Mr. Fay, General Manager of the Shore Line Investment Company who was negotiating for the loan. I said, 'Mr. Fay, if Mrs. Harvey has to sign this stock agreement, being the owner, the stock will have to be put in her name now.' He said, 'Not now; I am just collecting the stock to see how much I can get. When the time comes, Mrs. Harvey will have to sign the agreement, and the stock will have to be put in her name, but at this time I do not need it. What I want to see is how much stock I can get for this purpose.'

"I gave this stock to Mr. Fay. They were in my name, but had my endorsement on them. I received them back from Mr. Fay around the 26th of November, or a little before. As negotiations were still going on, and the same obligation would be insisted upon by any bank making a loan, I had the stock transferred to Mrs. Harvey's name.

"I receipted for the stock, but Mr. Corbet said, 'I will have to have Mrs. Harvey's receipt. I will give you a receipt.' He dictated one to his stenographer which he handed to me and which I took

(Testimony of J. Downey Harvey.)

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(Testimony of J. Downey Harvey.)

or sent to Mrs. Harvey. This was returned to me and the certificates were given to Mrs. Harvey later. The negotiations for the loan kept up until sometime in December. On December 9th, we levied an assessment. We did not make the loan, because our payments commenced to come in and we were able to discharge our obligation and collected sufficient money to satisfy our creditors. It was while these negotiations were pending that I had the stock transferred to Mrs. Harvey's name. At the conclusion of the negotiations I sent the stock to Mrs. Harvey. I either sent the stock to Mrs. Harvey, or took [135] it down to her myself to Del Monte. I have never had the certificates in my possession except as I have testified here, from the time they were first delivered until this action was commenced. The suit of the Baldwin Locomotive Works had nothing whatever to do with the transfer of that stock. Neither the fact that such suit was to be brought, or that any suit might be brought against me."

Cross-examination.

On cross-examination by counsel for the plaintiff, witness testified as follows:

"I was never the owner of the stock in question here, 546 shares of the Shore Line Investment Company. I bought it for Mrs. Harvey. I never considered it mine. It was my money which purchased the stock, but I acquired it for my wife. I was never connected with the stock in any way, except to vote it and carry out the duties of an officer of the cor-

(Testimony of J. Downey Harvey.)

poration. Immediately on acquiring the stock I regarded it as her stock.

"I have seldom had occasion to examine my private ledger and have seen more of it lately than in 12 years past. I had bookkeepers from 1905 to 1909, whom I regarded as competent men. I did not aid them in keeping their books. They kept them as they saw fit. I might have given them some memoranda, but never assisted them in carrying it out. Very few memoranda were necessary. The books were made up from my cash-book, or I should say from my check-book. When an entry was to be made regarding a matter exclusively within my own knowledge, I furnished the information to the bookkeeper. This was generally by a memorandum, but might be verbally. I did not deem the entries in my books of importance to anybody but myself. I did deem them, in a measure, of importance to myself.

"I have no particular fault to find with the method of [136] keeping my books. They were simply a record of whatever properties I had, real estate which had come into my hands through inheritance or otherwise, and the only thing which I put into my books of information to me, were my check-books, in receiving my cash and checking it out. Nothing was likely to happen to property standing in my name, and I did not have occasion to go to my books, once a year. When the fire occurred my private matters were lost sight of. I took charge of the Ocean Shore properties, being President of the road, and my time

(Testimony of J. Downey Harvey.)

was entirely devoted to the affairs of the Ocean Shore Railroad and the Shore Line Investment Company. I had no personal business with outside persons which required me to interest myself in the keeping of my books. I was not conducting a commercial business and had no occasion to go to my books. As Mr. Crosby told you they were not written up for 18 months. It was my intention that the books should indicate a true state of my affairs to my satisfaction."

The attention of the witness was then called to page 44 of the ledger, under the head "Shore Line Investment Company" and to the notation, "This stock was purchased for Mrs. Harvey and belongs to her."

Witness further testified: "That notation was made by Mr. Crosby. He took charge of my books March 1st, 1908, and the entry is in his handwriting. It is very likely that I told him to make the notation. This was probably when he took charge of the books, or when he drew it to my attention. I could not tell you the month or year it was when I gave him that direction. I testified in this matter before the Referee in Bankruptcy and the following questions and answers were asked and given by me. 'Q. When was that notation made? A. That was made when Mr. Crosby took charge of my books. Q. In what year? A. Well, I think he took charge [137] of my books in 1909. It should be 1908? A. Yes.'"

"The reason that I did not have these shares of stock transferred to Mrs. Harvey in 1905, was as I

(Testimony of J. Downey Harvey.)

have testified, that we had just formed these two companies, and the Shore Line Investment Company depended upon the building of the Ocean Shore Railroad. I was the largest stockholder in both companies and thought that my association and prominence with the Ocean Shore Railroad would help the Shore Line Investment Company. There was a great deal of rivalry down that way as to this land business, and if we could make an association between the two, it would make the people who purchased at Granada feel that they were going to get a good railroad service, and if there was any favoritism or help to be had from the association with the railroad, we wanted to get it. If I was not connected with the Shore Line Investment Company, its position would be just the same as the other companies not associated with the railroad. There were other real estate companies formed. There was one called the Ocean Shore Land Company, which was very misleading, and it made many people believe that the Ocean Shore Railroad Company was interested in the development of the Ocean Shore Land Company. They took half our name and used half our name to designate their business, but we had no association with them whatever. There were several things arising like that so that it afterwards turned out to be of immense benefit that I retained my identity as a stockholder in the Shore Line Investment Company. As a matter of fact the men who furnished the money to build the Ocean Shore Railway Com-

(Testimony of J. Downey Harvey.)

pany put up the money to finance the Shore Line Investment Company.

"There was a close connection between the two companies through the people who formed them. There was no money connection between the two companies. The original stockholders [138] were the same.

"Referring to my trial balance, these books were not gotten up for public inspection. No human being ever saw them until they fell into the hands of my trustees, and I never expected that any such occasion would arise. They were intended solely for my private guidance in my private business transactions. It was not my intention that the stockholders of the Ocean Shore Railroad, or its creditors, or its directors, or any other organization should inspect my books.

"Referring to my trial balance made up in February, 1906, I was not in the habit of examining my trial balances. I had no interest in them. My purpose in maintaining bookkeepers was to write up my books once in a while and look after them, but mostly my check-book which I always had written up every month to know my condition. I have no recollection of examining any trial balance of the year 1906. I could not say that I did not. I have no recollection of having done so.

"Referring to the trial balance of December, 1906, and the entry of $23,610, I did not furnish the bookkeeper with that data to make up that account. He took it from the books. I had nothing to do with it.

(Testimony of J. Downey Harvey.)

I never discussed with Mr. Crosby the valuations of my various properties. I might have done so with Mr. Wasserman in 1904 or 1905. I never examined my trial balance in the years 1905 to 1910. I never knew of this book at all, never saw the book. I did not know that Mr. Wasserman kept the book. It was only recently that I knew that Mr. Crosby kept it. Up to that time I did not know that they had been keeping a trial balance. I knew that there was a ledger and cash-book and a journal. I never looked into the journal and never looked into the ledger in relation to the Shore Line Stock. I do not remember ever having looked into them with respect to my other investments. There was no reason [139] for my avoiding an examination of the Shore Line Investment Company stock. I never considered it my property. It passed out of my hands, was given to Mrs. Harvey, and I did not consider it mine at all. I never saw any entry of it in my books and did not know until a long time afterwards that it was entered there as my property.

"Referring to the letter dated September 22, 1907, written by Mr. Wasserman, I did not receive it. It might have come into my possession, but I do not remember when I received it. This is a carbon copy and I have not the original."

Mr. SCHLESINGER.—Q. "I will ask you whether or not upon receiving this statement, of which this is conceded to be a carbon copy, you notice that Mr. Wasserman had included in your list of assets under this caption upon page 3, 'besides the

(Testimony of J. Downey Harvey.)

above you should take into consideration the following,' due from Rodgers and other assets mentioned, and finally, 'Shore Line Investment Company, 23,610'—do you recall whether or not upon an examination of this statement furnished to you by your bookkeeper that you examined and noticed that particular item?"

A. "Yes, but the way he places it he does not consider it one of my assets."

Q. "I will ask you to answer my question yes or no."

A. "Will you please read the question?"

(The last question repeated by the Reporter.)

A. "Well, I noticed that item but I did not consider it as a part of my assets."

Q. "Will you kindly answer the question?"

A. "I never did."

Q. "I ask you whether you noticed the item?"

A. "I noticed the item."

Q. "Did you discuss the matter of this report with Mr. Wasserman?"

A. "I do not think I did." [140]

Q. "Never had a word of discussion with him?"

A. "Not to my recollection."

The witness then further testified as follows: "The reason that this stock appears in my books as my individual asset during all of these years, is that Mr. Wasserman probably entered it that way. I never noticed it to tell him not to do it. They were my private books and no one would be benefited by access to them. The stock was not mine. It was in

(Testimony of J. Downey Harvey.)

the possession of Mrs. Harvey, and it never entered my head at all about it. It had passed from my mind. In addition to this gift I bought her a lot on Pacific Avenue where we intended to build.

"Referring to my trial-balance book I find that the Pacific Avenue lot was carried as my asset from March 31, 1905, up to July 31st, 1905, in the year 1906 it is omitted. The books are not correct as to this lot, because I gave it to Mrs. Harvey on February 28th, 1905, and according to this book it still belonged to me in July 31, 1905. The Pacific Avenue lot appears in the trial-balance book as my asset until December, 1905, and then it is dropped, but the Shore Line Investment Company is carried as an asset in my trial-balance book all the way through.

"Regarding the entry in the ledger, this stock was purchased for Mrs. Harvey and belongs to her. I suppose I mentioned this matter to Mr. Crosby when he took charge of my books, and that he made the entry. He knew the fact before he took charge of the books. The way he knew was when the assessment was to be paid I handed him my check and received from him a receipt. I said that I could not get him the stock because it belonged to Mrs. Harvey, and that I could not get it until she returned from the east. The assessment was paid April 13, 1907. The assessment was not charged to the account of Mrs. Harvey, it [141] was paid with my money. I also paid an assessment on one hundred shares of Ocean Shore Railway stock for Mrs. Harvey. I do not remember whether that was charged up against

(Testimony of J. Downey Harvey.)

her or not. The books will show.

"There has been an account in my books under the caption of 'Family Gifts and Allowances.' It was started many years ago. As to whether that account truly indicated just what gifts and allowances I made, I never gave any thought. I hoped it was; I did not want it to be incorrect, but gifts to the family made very little difference. No one would have occasion to observe the matter. It was one of my own privilege. When I made gifts and allowances, these matters were not discussed by the bookkeepers with members of the family, nor did I give them instructions. I left it to them. I think my check-book would show this in every case. If a check was to my daughter for schooling, I presume the bookkeeper would note it under this head. For a household matter, likewise. I never gave him any directions. He used his own judgment.

"With regard to the gift of these shares of stock to Mrs. Harvey, I might have mentioned it to Mr. Wasserman in 1905. In 1906, the subject was never brought up. In 1907, I did in relation to the assessment. In 1908, I did not. The time that I mentioned it to him was prior to this report, exhibiting my affairs. I did not ask him to eliminate from that report the item of the Shore Line Investment Company. There was no necessity for it. As I read the report, he did not consider it one of my assets. He includes it with other items due from Mr. Rodgers for three assessments paid. I never expected Mr. Rodgers to return that money to me. Mr. Wasser-

(Testimony of J. Downey Harvey.)

man knew that. In reading over this statement I did not segregate and give any particular attention to the Shore Line Investment Co. item. I did not look upon those shares as any asset of mine, [142] nor the Rodgers note for the assessment that I paid on Ocean Shore stock. I have no recollection as to the closing part of the letter. I never discussed any of my affairs with Mr. Wasserman from that standpoint. I do not even know whether I read the letter. I did not regard the matter as of much importance, I voted this stock at all times and used my own judgment as to the property."

To a question as to whether the witness was at that time familiar with the affairs of the Shore Line Investment Company, counsel for the defendant S. G. Harvey objected as immaterial, irrelevant and incompetent and not proper cross-examination. The Court overruled the objection, and the witness answered, "I was."

The witness then further testified as follows: "I knew what my assets were, without the necessity of the process of bookkeeping. So far as I recall, I did not invite this record from my Secretary. I did not consult him on matters of that kind and gave him pretty full sway about things. I never gave any instructions to have my books kept so as to deceive me."

Referring to the cash book, the witness read the following items:

"Ocean Shore Railway Company assessment
No. 7, Stock from Mrs. J. D. H. at $3.00 . $300.00
Cash 50.00
W. E. Fuller & Company bill . . . . . 1.50"

(Testimony of J. Downey Harvey.)

Redirect Examination.

"From my examination of my books, concerning the gift of a lot to Mrs. Harvey, the item was carried, according to the trial balance, as my property until December in 1905, and the gift was made on the 28th day of February, 1905. This was the Pacific Avenue Lot. I do not know how many trial balances were taken. I never concerned myself about that." [143]

[Testimony of Charles W. Fay, for Defendant.]

CHARLES W. FAY, a witness called on behalf of the defendant S. G. Harvey, after being duly sworn, testified as follows:

"I am the general manager of the Shore Line Investment Company. I have held that position since January, 1906. I met Mr. Harvey very frequently. My business called me into consultation with him constantly, almost every day, and about that time he informed me —"

To this testimony counsel for the plaintiff objected as immaterial, irrelevant and incompetent and self-serving. The Court overruled the objection, and the witness continued:

"Mr. Harvey told me at this time that this stock was Mrs. Harvey's. This was in 1906. I recall the circumstance of a negotiation with reference to paying off some indebtedness of the Shore Line Investment Company, in 1909. As General Manager of the Shore Line Investment Company, I was authorized to negotiate for a loan to clean up this indebtedness. I negotiated with a certain banking institu-

(Testimony of Charles W. Fay.)

tion here, and one of the conditions was that the stock of the various stockholders, or at least 90% of them was called for, for the purpose of securing this loan. Also, that an agreement should be signed by the owners of the stock, holding themselves proportionally liable for the amount to be borrowed. I called on Mr. Harvey and asked him for the stock held in his name in this Company, explaining my purpose. He said he would get the stock; that it was Mrs. Harvey's stock. I asked him how long it would be, and he said he would have to send for it; I believe that Mrs. Harvey was then at Del Monte. Two or three days subsequently I called on him and he gave me the certificates of stock standing in his name, endorsed. They did not remain so very long in my possession. I was collecting it for the trustee who was to hold the stock. I judge that it was either in my possession, or in his, for [144] probably thirty days. The negotiations did not go through, and subsequent to that time there was an assessment levied on account of the demand of the French Bank for a payment on their loan. I gave the stock, I think, to Mr. Guggenheim, who was to hold this and the other stock. I do not recall whether I returned it to Mr. Harvey, or whether he got it back from Mr. Guggenheim direct."

Cross-examination.

"I first had physical possession of these shares of stock in October or November, 1909. I received them from Mr. Harvey."

[Testimony of Mrs. S. G. Harvey, for Defendant.]

Mrs. S. G. HARVEY, called in her own behalf, after being duly sworn, testified as follows:

"I am the defendant S. G. Harvey in this case and am the wife of J. Downey Harvey. Mr. Harvey handed me certificates of stock of the Shore Line Investment Company, in 1905, as he got them; in San Francisco, some of them. The only communication I had from him was when I was in New York to the effect that there had been an assessment and that he had paid it and when I came home I gave him the certificates. These had remained altogether in my possession from 1905 until 1909 with the exception of the time of the payment of the assessment, and the changing of the shares to Mr. Folger, as has been testified here. I had the certificates continuously in my possession and they were endorsed."

Cross-examination.

"I testified before the Referee in Bankruptcy, December 5th, 1911. Mr. Harvey gave me the stock certificates in the middle of 1905, the first one in June. I recall the date of the certificate, [145] but not the date of his giving it. I made a memorandum of this date when I received the certificates. I saw that memorandum this morning. I could not remember whether it was pencil or ink. I took the dates of the certificates and not the dates of their receipt. I made the memorandum at the time I got the certificate, but simply took the date of the certificate and not the date when I received it. I made that memorandum on the date that I received the

(Testimony of Mrs. S. G. Harvey.)

stock. I received the next stock in August, and on the same memorandum made a note of the date of that certificate. Likewise as to certificates received in September. The dates on the certificates were approximately the dates on which they were received."

A memorandum was then handed to the witness who testified: "No, this is not the original memorandum. This is my handwriting. I took it from the memorandum I had taken at the time—the dates of these certificates. I made this at the beginning of the trial. The original memorandum which I made were on slips of paper which I pinned together, but they were not the dates I received them. I have not the slips. I made this memorandum and destroyed them. I kept the slips from 1905 up to the time I made this memorandum. I entered on a little slip of paper the number of shares and the date of the particular certificate whenever I received one from Mr. Harvey. About December 5th, 1911, I copied them off on this memorandum and destroyed the slips. This memorandum is in my handwriting."

Said memorandum was thereupon offered and admitted in evidence and marked Exhibit No. 9.

Exhibit No. 9.

"300 shares delivered June 26th, 1905;

On August 22nd, 1905, received 40 shares;

On August 22nd, 1905, received 26 shares;

On September 22nd, 1905, received 180 shares."

[146]

The witness then further testified: "It was my

(Testimony of Mrs. S. G. Harvey.)

custom to make memorandums of the gifts which I received; the few that I did receive. All of the other slips have been destroyed likewise. I do not think I have any memorandum now of anything. No one suggested that I make such memorandums. I think my memory was good on December 5th, 1911, I tried to make it so."

Redirect Examination.

"This memorandum was made by me in response to a request by the Court, and at that time I used the slips I spoke of, afterwards destroying them. The items shown on this memorandum were taken from my separate memorandums of these different transactions and not from any other source. With regard to the letter that was offered in evidence, expressing my allowance to have them secure the information from the safe deposit; that letter was drawn for me by my counsel, Mr. Wheeler. This occurred on the same day when I transcribed it. I gave it to my husband to be delivered to the Court. I told him to deliver it immediately, and to hurry. When I was first on the witness-stand, I testified that these certificates were in my box in the safe deposit. I had had no counsel or advice before attending that hearing."

Mr. SCHLESINGER.—"I object to that as immaterial, irrelevant and incompetent. It would be a novel proposition to lay down as the excuse for not testifying correctly that the fact is not the subject of counsel."

The witness then further testified as follows:

(Testimony of Mrs. S. G. Harvey.)

[147] "I went over the transaction in my own mind in a certain vague way. I did not know what questions I was going to be asked and I answered just as I then remembered. I thought at that time I had put this stock in safe deposit. There was also mentioned in the letter an item which I had omitted and which I did not recall upon the stand, and that I also put in my letter. After I had written the letter I went on the stand and made correction of my testimony."

Counsel for the defendant stated, "I will have to read to you something that is already in evidence," and then read into the record a portion of the testimony of the witness taken before the Referee in Bankruptcy, previously offered in evidence by the plaintiff, as follows:

"Q. Did you also have in the safe shares of stock owned or controlled or held by you in any other corporation or corporations? A. No, I did not.

Q. Where did that stock rest?

A. It rested in the safe.

Q. I am talking of shares of stock held by you in other corporations. Where did those shares rest during those years—the shares of stock which you have mentioned in your testimony?

A. My different papers rested in my safe at Del Monte.

Q. Your safe in Del Monte? A. Yes.

Q. That is what I am asking you, whether or not you kept in that same safe all other shares owned,

(Testimony of J. Downey Harvey.)

controlled, or held by you in that same safe. Your answer is 'Yes.'

A. Yes, whatever papers I had, I had in that safe.

Q. Did you ever take any jewelry with you to Monterey? A. Yes.

Q. That also was placed in that safe, was it?

A. Yes.

Q. Then do I understand, Mrs. Harvey, that all of your valuable papers, evidence of ownership in corporations, shares of stock, and other valuables, including your jewels, were not held by [148] you in your safe deposit box in the First National Bank Vaults but in this safe?

A. Yes—I beg pardon; there was a little old match box, belonging to my uncle in the safe deposit box, some antiques; but my usual jewels I had with me.

Q. And your answer is 'Yes' with respect to all valuable papers? A. Yes, sir.

Q. And outside of this little antique match box that deposit box contained nothing really of any value? A. No.

Q. The letters which you had in the safe deposit box were of no particular value?

A. Just personal letters that I used to keep, but they had no particular value that I remember.

Q. Then to sum that matter up briefly, that branch of it, Mrs. Harvey, I understand that that safe deposit box which you kept and paid for during the years 1906, 1907, 1908, 1909 and 1910, that particular safe deposit box contained nothing of value aside from this antique match box which you of course

(Testimony of Mrs. S. G. Harvey.)

highly prized, and some letters which had little value to you? A. Yes."

Earlier in the same testimony, however, the same witness had said—(reading):

"Q. Where was that safe deposit box?

A. In the First National Bank.

Q. In the year 1907 did you have a safe deposit box? A. I did.

Q. In the First National Bank vaults?

A. In the First National Bank vaults.

Q. Did you have any other safe deposit box during that year?

A. No." And the same answer as to the other years down to 1910.

"Q. Did you keep in that box various shares of stock, Mrs. Harvey?

A. I kept my letters and things of that sort, sometimes shares, sometimes not.

Q. During the year 1905 you had in that box certain shares of stock of the Shore Line Investment Company?

A. I did not. I [149] made a mistake in my testimony, that is the reason I wanted to correct it.

Q. Did you ever have any shares of stock in the Shore Line Investment Company in your box of the First National Bank vaults at any time?

A. No, I think not. On thinking it over I kept it in my own safe.

Q. I take it that at no time during any of these years did any of the shares of stock either in the name of J. Downey Harvey or your name, or in-

(Testimony of Mrs. S. G. Harvey.)

dorsed to you, or in your possession ever rest in the box—

A. (Interrupting.) Of the Shore Line Investment Company, no.

Q. But you did have during those years shares of stock in other corporations—

A. I had other papers, yes.

Q. Are you able to mention without specifically giving me the number of shares, what other shares of stock you had of other corporations in that box?

That question was not answered.

Q. You did have, Mrs. Harvey, shares of stock in other corporations belonging to you?

A. I don't think I did, no. I had some shares of stock but I don't think I had them in the safe deposit."

The witness then continued: "Since that testimony was given I went to my safe deposit box. At the time I testified I could not recall anything more as being in that box except the articles I testified to, but when I went to the box I found other papers besides those letters, including two old deeds and another antique, two or three. I found Mr. Harvey's will and my own will. At the time I testified, I had forgotten both the wills and the deeds. There were no shares of stock in the box, except some Bullfrog mining stock. There was also a little envelope, which shows that I have some more stock on the books of that company." [150]

Both these certificates were thereupon offered and received in evidence on behalf of defendant, the one

(Testimony of Mrs. S. G. Harvey.)

bearing date the 8th day of April, 1908, and the other December 4th, 1906.

The witness then continued: "I had no recollection on the 5th day of December, or on the later day, when I testified that there was any Bullfrog stock in my safe deposit box."

Mr. WHEELER.—"I am about to conclude with the witness. I will ask you the question generally, Mrs. Harvey, have you a clear and accurate memory as to dates and transactions which happened five or six years ago?"

A. "I am afraid I have not, Mr. Wheeler."

Recross-examination.

"On the 26th day of June, 1905, I think I was in San Francisco, but I am not positive. I was here very shortly after, if not at that date, during the first part of July. During the month of June, 1905, I may have been in New York. I do not know on what day I left here for New York. I left New York for San Francisco, I think in the first part of July. I am quite certain that I was here during part of June. I don't know that I returned on July 6th, 1905, but I did return in the early part, the beginning of July. I returned here early in July. I do not know what weeks of June I spent in New York. I think I was in New York in the latter part of June, 1905. I do not know whether I was on the train on the 4th day of July, en route to San Francisco. I went East and came back hurriedly. If I was here in the beginning of July I was in New York on the 26th. I think I was in New York or on the

(Testimony of Mrs. S. G. Harvey.)

way back on July 4th. In entering these transactions on slips of paper, after I have put them all on one paper, there was no necessity of keeping the slips, and I destroyed them." [151]

[Testimony of Mrs. Ward Barron, for Defendant.]

Mrs. WARD BARRON, a witness called on behalf of the defendant S. G. Harvey, after being duly sworn, testified as follows:

"I am the daughter of Mrs. J. Downey Harvey. During the winter of 1907 I resided with my mother in Monterey. We were there for two or three years at the Hotel Del Monte. During that time I had some conversation with my mother about my father's affairs. In this conversation *mentioned* was made of the shares of stock of the Shore Line Investment Company."

To testimony of this conversation, counsel for plaintiff objected as immaterial, irrelevant and incompetent. The objection was overruled and the witness continued:

"My mother was worried very often about the affairs of the Ocean Shore, and I asked her if she did not have anything of her own that would be very valuable, and she said that she had shares in the Shore Line Investment Company, and those, Mr. Harvey told her, were going to be very valuable some day. This conversation took place in 1907, and several times after that."

Cross-examination.

"On June 26th, 1905, I think my mother was in New York; I was at school at New York and had

(Testimony of Mrs. Ward Barron.)

graduated. My mother was there to take me out of school and take me home in June, 1905."

Redirect Examination.

"We arrived in California early in July, according to my recollection, my mother having come to bring me home."

[Testimony of Robert Finn, for Defendants (Recalled—Cross-examination).]

ROBERT FINN, recalled for further cross-examination, testified:

"I have examined the books which were offered in evidence [152] for the month of May, 1905, in which month Mrs. Harvey made a change from one safe to another. Our books do not show that she visited either safe at the time she made the change. Mrs. Harvey had only one safe deposit box there at a time. In the month of May, she changed from one box to another, but that record does not show that she was present at the safe deposit vaults at any time in the month of May. It is from a registration card that I knew that Mrs. Harvey was there when she made the change, but there is no record on the books."

[Testimony of Charles W. Fay, for Defendants (Recalled).]

CHARLES W. FAY, recalled in response to a question by the Court, testified:

When Mr. Harvey gave me those certificates, as I previously testified, they bore his endorsement on the back. The earliest date that I saw these certifi-

(Testimony of Charles W. Fay.)

cates was the latter part of October or the first part of November, 1909. They were not endorsed to Mrs. Harvey, but simply in blank, as I recall them.

The defendants here rested.

[Order Approving Statement of Evidence on Appeal.]

On stipulation of the parties that the foregoing statement of evidence on appeal is true, complete and properly prepared, the same is hereby approved.

Dated this 30th day of March, 1914.

M. T. DOOLING,

Judge of the District Court of the United States for the Northern District of California. [153]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,

Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,

Defendants.

Stipulation to Statement on Appeal.

IT IS HEREBY STIPULATED, by and between B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, plaintiff

and respondent, and S. G. Harvey, defendant and appellant in the above-entitled action, and their respective solicitors, that the foregoing Statement on Appeal, having embodied in it the amendments proposed by the respondent, is true, complete and properly prepared to the satisfaction of the said parties and their respective solicitors undersigned. Notification to the respondent and his solicitors of the lodgment in the Clerk's office of the original statement prepared by appellant, and of naming the time and place when appellant will ask the Court, or Judge, to approve the said statement, are hereby waived.

IT IS FURTHER STIPULATED, that the foregoing statement may be approved by the Court, or a Judge thereof, as provided in Rule 75 of the Rules of Practice in Equity, promulgated by the Supreme Court of the United States, November 4, 1912, subject to such direction as the Court, or a Judge thereof, [154] may give in respect of such approval.

Dated, March 30th, 1914.

BERT SCHLESINGER,
A. E. SHAW,
EDWIN H. WILLIAMS,
Solicitors for Plaintiff and Respondent.
CHARLES S. WHEELER and
JOHN F. BOWIE,
Solicitors for Defendant and Appellant.

[Endorsed]: Filed Mar. 30, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [155]

In the District Court of the United States, in and for the Northern District of California, Division Number One.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Notice of Having Deposited Stock Certificate in Accordance With Order Allowing Appeal and Supersedeas.

To B. S. Stowe, trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, and to Messrs. Schlesinger & Shaw and Edwin H. Williams, His Attorneys:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE, that the defendant in the above-entitled action, S. G. Harvey, has this day deposited with the Clerk of the above-entitled Court, Certificate No. 83 for 546 shares of the capital stock of Shore Line Investment Company, a corporation, endorsed by her. That the said deposit is made in compliance with two certain orders this day made by the above-entitled Court, to wit: An order allowing an appeal with *supersedeas,* and also an order granting a writ of error with *supersedeas.*

Dated, this 21st day of November, 1913.

CHARLES WHEELER and
JOHN F. BOWIE,
Attorneys for Def. S. G. Harvey. [156]

Above Certificate No. 83 received this 21st day of Nov., 1913.

[Seal] W. B. MALING,
Clerk.
By C. W. Calbreath,
Deputy.

Receipt of a copy of the within Notice this 21st day of November, 1913, is hereby admitted.

SCHLESINGER & SHAW,
ED. H. WILLIAMS,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 25, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [157]

In the United States Circuit Court of Appeals for the Ninth Circuit, Northern District of California.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Stipulation as to Record on Appeal.

Both a writ of error and an appeal on behalf of the

defendant, S. G. Harvey, having been allowed in the above-entitled cause,—

IT IS HEREBY STIPULATED, by and between plaintiff and said defendant and their respective counsel undersigned, that subject to the approval of the above-entitled court, a single transcript may be printed by the Clerk of the District Court, covering the record both on writ of error and on appeal, without duplication as to pleadings or other papers forming a part of the above records.

All rights to make any and every objection to the propriety of said appeal and writ and motions to dismiss the same are reserved.

Dated, this 8th day of December, 1913.

A. E. SHAW,
BERT SCHLESINGER,
SCHLESINGER & SHAW,
EDWIN H. WILLIAMS,
Attorneys for Plaintiff.

CHARLES W. WHEELER, and
JOHN F. BOWIE,
Attorneys for Defendant S. G. Harvey. **[158]**

[Order on Stipulation as to Record on Appeal.]

It is so ordered by the Court.

WM. W. MORROW,
Judge.

[Endorsed]: Filed Dec. 31, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[159]**

Certificate of Clerk U. S. District Court to Transcript on Appeal and Writ of Error.

I, W. B. Maling, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify the foregoing 159 pages, numbered from 1 to 159, inclusive, contain a full, true, and correct Transcript of the record and proceedings in the case of B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Plaintiff, vs. J. Downey Harvey, S. G. Harvey et al., Defendants, numbered 15,222, as the same now remain on file and of record in the office of the Clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with the "Amended Praecipe for Transcript on Appeal and Writ of Error" and the instructions of attorneys for defendants and appellants herein, a copy of which said Praecipe is contained in the foregoing Transcript.

I further certify that the costs of preparing and certifying the foregoing Transcript on Appeal and Writ of Error is the sum of Ninety-three Dollars and Eighty Cents ($93.80), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto are the original Citations on Appeal and Writ of Error and the Original Writ of Error with the return attached thereto.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court

this 4th day of April, A. D. 1914.

[Seal] W. B. MALING,
Clerk.
By Lyle S. Morris,
Deputy Clerk. **[160]**

Citation on Appeal (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 14th day of March, 1914, being within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the District Court of the United States, for the Northern District of California, in the suit numbered 15,222 in the records of the said Court, wherein S. G. Harvey is defendant and appellant, and you are plaintiff and appellee, to show cause, if any there be, why the decree rendered against the said defendant and appellant S. G. Harvey, as in said order allowing appeal and in said decree mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern Dis-

trict of California, this 14th day of February, 1914.

M. T. DOOLING,
United States District Judge.

Reserving all objections and exceptions receipt of a copy admitted this 16 day of February, 1914.

BERT SCHLESSINGER,
A. E. SHAW,
E. H. WILLIAMS,
Solicitors for B. S. Stowe, Trustee, Plaintiff and Appellee. [161]

[Endorsed]: No. 15,222. In the United States District Court for the Northern District of California, Division No. One. B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Plaintiff, vs. J. Downey Harvey, S. G. Harvey, John Doe, Richard Roe, Jane Black, Defendants. Citation. Original. Filed Feb. 16, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California, Division Number One.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Writ of Error (Original).

United States of America,—ss.

The President of the United States to the Honorable Judge of the District Court of the United States, for the Northern District of California, Division Number One, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between S. G. Harvey, plaintiff in error, and B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, defendant in error, a manifest error hath happened to the damage of S. G. Harvey, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected and full and speedy justice be done to the party aforesaid, in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court [164] of Appeals, for the Ninth Circuit, together with this writ, so that you have the same, at the City and County of San Francisco, State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the law and customs of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 24th day of November, A. D. 1913.

[Seal] W. B. MALING,
Clerk of the District Court of the United States, in and for the Northern District of California.

C. W. Calbreath,
Deputy.

Allowed this 21st day of November, A. D. 1913.

WM. C. VAN FLEET,
Judge. [165]

24th day of November, 1913, is hereby admitted.

SCHLESINGER & SHAW,
EDWIN H. WILLIAMS,
Attorneys for Plaintiff.

[Endorsed]: No. 15,222. In the United States District Court for the Northern District of California, Division No. One. B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Plaintiff, vs. J. Downey Harvey, S. G. Harvey, John Doe, Richard Roe, Jane Black, Defendants. Writ of Error. Filed Nov. 25, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Return to Writ of Error.

The Answer of the Judges of the District Court of United States of America, for the Northern District of California, to the within Writ of Error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this Writ annexed, the record and all

proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 25th day of November, A. D. 1913, duly lodged in the case in this Court for the within named defendant in error.

By the Court:

[Seal] W. B. MALING,

Clerk United States District Court Northern District of California.

By Lyle S. Morris,
Deputy Clerk. **[168]**

Citation on Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth District, to be holden at the City and County of San Francisco, in the State of California, on the 14th day of March, 1914, being within thirty days from the date hereof, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States, in and for the Northern District of California, wherein S. G. Harvey, is the plaintiff in error, and you are the defendant in error,

to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 14th day of February, A. D. 1914.

M. T. DOOLING,
United States District Judge.

Reserving all objections and exceptions, receipt of a copy admitted this 16th day of February, 1914.

BERT SCHLESINGER,
A. E. SHAW,
E. H. WILLIAMS,
Solicitors for B. S. Stowe, Trustee, Defendant in Error. [169]

[Endorsed]: No. 15,222. In the United States District Court for the Northern District of California, Division No. One. B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Plaintiff, vs. J. Downey Harvey, S. G. Harvey, John Doe, Richard Roe, Jane Black, Defendants. Citation. Original. Filed Feb. 16, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [170]

[Endorsed]: No. 2401. United States Circuit Court of Appeals for the Ninth Circuit. S. G. Harvey, Appellant and Plaintiff in Error, vs. B. S. Stowe,

as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellee and Defendant in Error. Transcript of Record. Upon Appeal from and Writ of Error to the United States District Court for the Northern District of California, First Division.

Received and filed April 4, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth District.

S. G. HARVEY,
Appellant and Plaintiff in Error,
vs.
B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Appellee and Defendant in Error.

Affidavit for Extension of Time to File Record and Docket Cause.

State of California,
City and County of San Francisco,—ss.

Nathan Moran, being first duly sworn, deposes and says:

That he is an attorney at law duly admitted to practice in all of the courts of the State of California, and in the District Court of the United States, for the Northern District of California. That here-

tofore, on or about the 13th day of March, 1914, affiant made an affidavit for an extension of time to file record and docket the above-entitled cause in this Court, and hereby refers to said affidavit, and by reference incorporates herein the facts and statements there deposed to. That upon said affidavit this Court made an order allowing fifteen (15) days from and after the 14th day of March, 1914, within which to file the record and docket the said cause. That affiant promptly thereafter delivered to the solicitors and attorneys for the appellee and defendant in error, an engrossed copy of the statement of evidence on appeal. That by reason of his engagement in a case pending in the District Court of the United States, the attorney for the appellee and defendant in error having charge of the preparation of said record, was unable to complete his comparison thereof until to-day. That the said statement was this day stipulated to by the attorneys and solicitors for the respective parties, and was approved by a Judge of the District Court of the United States, and was filed in the office of the Clerk of the First Division of the last-mentioned court.

That further time is required by the Clerk of the said last-mentioned Court to prepare the said record. That affiant is informed by the Clerk of the District Court of the United States, and believes that said record can be prepared and filed in the office of the Clerk of this Court, on or before the 4th day of April, 1914, and in time to be assigned for hearing upon the May Calendar of this Court.

WHEREFORE affiant respectfully requests that

an order be made granting five (5) days additional time, from and after this date, to file said record on appeal and on writ of error in this cause, and to docket the said cause.

Further deponent saith not.

NATHAN MORAN.

Subscribed and sworn to before me this 30th day of March, 1914.

[Seal] ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California.

[Order Extending Time to April 4, 1914, to File Record Thereof and to Docket Cause in Appellate Court.]

Upon reading and filing the foregoing affidavit, and good cause appearing therefor:

IT IS HEREBY ORDERED, that five (5) days from and after the 30th day of March, 1914, be, and the same is, hereby granted for the filing of the record and the docketing of the above-entitled cause on appeal and writ of error.

Dated March 30th, 1914.

WM. W. MORROW,

Judge.

[Endorsed]: No. 15,222. In the United States Circuit Court of Appeals for the Ninth Circuit. S. G. Harvey, Appellant and Pltff. in Error, vs. B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellee and Deft. in Error. Affidavit for Extension of Time to File Record and Docket Cause and Order. Filed Mar. 31,

1914. W. B. Maling, Clerk. By ————, Deputy Clerk. Filed Mar. 31, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

S. G. HARVEY,

Appellant and Plaintiff in Error,

vs.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,

Appellee and Defendant in Error.

Affidavit for Extension of Time to File Record and Docket Cause.

State of California,
City and County of San Francisco,—ss.

Nathan Moran, being first duly sworn, deposes and says:

That he is an attorney at law duly admitted to practice in all of the courts of the State of California, and in the District Court of the United States, for the Northern District of California. That he is associated with, and employed by, Charles S. Wheeler and John F. Bowie, attorneys and solicitors for S. G. Harvey, appellant and plaintiff in error in the above-entitled cause. That an appeal and a Writ of Error have both been allowed to the said S. G. Harvey, in said cause, and that affiant has charge of the preparation of the record on such appeal and Writ of Error, and is the only person representing the said S. G. Harvey thoroughly familiar with the condition of the above-entitled cause, and the records thereof.

That the above-entitled court, upon stipulation of the parties, heretofore made an order allowing the appeal and Writ of Error in said cause to be brought up upon a single record.

That there was prepared, under the direction of affiant, a statement of the evidence on appeal, on behalf of the appellant, and the same was lodged in the office of the Clerk of the District Court of the United States for the Northern District of California, at the time of filing appellant's praecipe, under Rule 75 of Rules of Practice in Equity promulgated by the Supreme Court of the United States. That the appellee, in due time, proposed amendments to the said statement. That affiant was unable to agree with the solicitors of the appellee, upon a settlement and allowance of the said amendments to the said statement of evidence on appeal, until within ten days last past, or thereabouts, owing to the absence from the State of California of the solicitor for the appellee having this matter in charge. That affiant has caused to be prepared an engrossed statement of evidence, embodying the amendments of appellee agreed upon by the respective solicitors for the parties, and the same is now completed with the exception of the incorporation therein of certain exhibits offered in evidence at the hearing of the cause.

That citations were duly issued upon the said appeal and upon the said Writ of Error, and the same are returnable in the above-entitled court, under Rule 16 of the said court, on the 14th day of March, 1914. That for the causes above specified, affiant has been unable to complete the record for filing within the

time permitted under said Rule 16. That affiant verily believes that the said record can be completed and filed with the Clerk of the District Court of the United States, for the Northern District of California, within ten (10) days, or thereabouts from the date hereof. That in order to permit the printing of the same record, which will be somewhat voluminous, an extension of thirty (30) days from the 14th day of March, 1914, within which to file said record on appeal and on Writ of Error in this cause, and to docket the said cause, will not be an unreasonable time, and affiant prays that an order be made granting such extension.

Further deponent saith not.

NATHAN MORAN.

Subscribed and sworn to before me this 13th day of March, 1914.

[Seal] ALICE SPENCER,
Notary Public in and for the City and County of San Francisco, State of California.

[Order Extending Time to March 29, 1914, to File Record Thereof and to Docket Cause in Appellate Court.]

Upon reading and filing the foregoing affidavit, and good cause appearing therefor:

IT IS HEREBY ORDERED, that fifteen (15) days from and after the 14th day of March, 1914, be, and the same is, hereby granted for the filing of the record and the docketing of the above-entitled cause

on appeal and Writ of Error.

Dated March 13, 1914.

WM. W. MORROW,
Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. S. G. Harvey, Appellant and Plaintiff in Error, vs. B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellee and Defendant in Error. Affidavit and Order for Extension of Time to File Record and Docket Cause. Filed Mar. 13, 1914. F. D. Monckton, Clerk.

No. 2401. United States Circuit Court of Appeals for the Ninth Circuit. Orders Under Rule 16 Enlarging Time to April 4, 1914, to File Record Thereof and to Docket Case. Refiled Apr. 4, 1914. F. D. Monckton, Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

S. G. HARVEY,
Appellant and Plaintiff in Error,

vs.

B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Appellee and Defendant in Error.

No. 2401.

BRIEF FOR APPELLANT AND PLAINTIFF IN ERROR.

STATEMENT OF FACTS

DID MR. HARVEY GIVE 546 SHARES OF STOCK OF THE SHORE LINE INVESTMENT COMPANY TO MRS. HARVEY IN 1905 WHEN HE WAS SOLVENT? OR DID HE GIVE IT TO HER ON NOVEMBER 26, 1909, WHEN HE WAS INSOLVENT?

That is the only issue in this case.

On the 26th day of November, 1909, four certificates aggregating 546 shares of the capital stock of

the Shore Line Investment Company were transferred upon the books of said corporation from the name of J. Downey Harvey into the name of Sophie G. Harvey (Trans., p. 87).

That Mr. Harvey was insolvent on November 26th, 1909, is not disputed by his wife, although he was not adjudged a bankrupt until a year later. If the gift to her of the said stock was not made prior to Nov. 26, 1909, it follows as matter of law that the gift was not valid as against Mr. Harvey's creditors.

But Mrs. Harvey claims that this stock was given to her by Mr. Harvey in 1905, at a time when Mr. Harvey was entirely solvent. At that time he was worth from half a million to $750,000.00 above all liabilities. Mrs. Harvey alleges that certificates representing these shares were issued to Mr. Harvey in 1905, and that in the same year he endorsed and delivered them to her, and that the same or other certificates for which they were surrendered, have continued ever since in her possession, save that on three occasions one or more of said certificates were delivered into the custody of Mr. Harvey for temporary purposes, and were in each instance returned to her within a few days.

It is not disputed that at some time there was a delivery to Mrs. Harvey of certificates representing this stock. The sole question is: In which year—1905 or 1909—was the delivery made?

THE EVIDENCE THAT THE GIFT WAS MADE IN 1905.

The witnesses whose testimony is relied upon to establish the fact that the gift was made in 1905 are not only the two principals to the transaction—Mr. and Mrs. Harvey;—but also Mr. Fay, now Postmaster of San Francisco—Mr. Burke Corbet, a reputable practitioner at this Bar; Mr. Wasserman and Mr. Crosby, who were Mr. Harvey's bookkeepers, and Mrs. Barron, daughter of Mr. and Mrs. Harvey.

MR. HARVEY testified as follows:

> "I was one of the organizers and incorporators of the Shore Line Investment Company, incorporated. In May or June, 1905, prior to the incorporation, I visited the lands subsequently deeded to the company. My wife was with me on the occasion of my first visit (Trans., p. 148). . . . It was intended as an investment or improvement land company, and I showed Mrs. Harvey where the principal holdings was to be on the north end of Halfmoon Bay, now known as Granada, and I told her we were about to acquire property there. . . . I told her at that time that I was going to give her my stock that I would acquire in that land company. After the acquisition of the land, and the organization of the company, the stock was issued to me in June, 1905, one lot, another lot in August, 1905, and two lots in September, 1905. Stock certificates were issued to me and when I received them, I endorsed them and gave them to Mrs. Harvey in conformity to what I told her I was going to do" (Trans., p. 149).

Mr. Harvey further testified that on one occasion in 1906 he got one of the certificates from Mrs. Harvey and transferred the same into the name of J. A. Folger, to enable the latter to act as a Director in the corporation; that Mr. Folger endorsed the certificate of stock and it was returned to Mrs. Harvey

(Trans., p. 151); that later on, in 1907, the certificate standing in Mr. Folger's name was again placed in Mr. Harvey's name and the certificate was endorsed by him and returned to Mrs. Harvey (Trans., p. 152).

He also testified that early in November, 1909, he got all the stock from Mrs. Harvey and delivered it to Mr. Fay for use in a proposed financial transaction, and that on Nov. 26, 1909, in the expectation that Mrs. Harvey would be called upon to sign a certain agreement as a stockholder, the shares were transferred into her name (Trans., p. 153).

The witness then continued:

> "I have never had the certificates in my possession except as I have testified here, from the time they were first delivered until this action was commenced. . . .
>
> "I was never the owner of the stock in question here —546 shares of the Shore Line Investment Company. I bought it for Mrs. Harvey. I never considered it mine. It was my money which purchased the stock, but I acquired it for my wife. I was never connected with the stock in any way, except to vote it and carry out the duties of an officer of the corporation. Immediately on acquiring the stock I regarded it as her stock" (Trans., pp. 154-155).

MRS. HARVEY testified as follows:

> "Mr. Harvey handed me certificates of stock of the Shore Line Investment Company, in 1905, as he got them; in San Francisco, some of them. The only communication I had from him was when I was in New York to the effect that there had been an assessment and that he had paid it, and when I came home I gave him the certificates. These had remained altogether in my possession from 1905 until 1909 with the exception of the time of the payment of the assessment, and the changing of the shares to Mr. Folger, as has been testified here. I had the certificates continuously in my possession and they were endorsed" (Trans., p. 166).

The testimony which is directly corroborative of the testimony of Mr. and Mrs. Harvey, and which the learned Judge of the trial court seems to have failed utterly to grasp the significance of, covers a number of years. Beginning with the year of the gift—1905—it runs as follows:

1905.—MR. BURKE CORBET, an attorney of this Bar, associated with Mr. Harvey in the Shore Line Investment Company, and Secretary of the corporation, testifies:

> "I am the Secretary of Shore Line Investment Company, a corporation, and have held that office ever since the organization of that company in May or June, 1905. . . . I also have in my possession the original certificates issued to Mr. Harvey" (Trans., pp. 86-87).
>
> "Prior to the issuance of any stock whatever, in the name of Mr. J. Downey Harvey, I had a discussion with him as to how the stock that was subsequently issued in his name should be issued. He said to me at that time that he was buying the stock and was giving it to Mrs. Harvey. I suggested to him then that if this was true the stock should be issued in Mrs. Harvey's name. Mr. Harvey said that he preferred to have it issued in his own name because he wanted to be a Director of the corporation, and wanted to participate actively in the management of the corporation. I told him at that time, and at a number of other times when subsequent stock certificates were issued in his name, that I thought the stock ought to be issued in the name of Mrs. Harvey, if she was the owner of the stock, and advised him at different times to that effect.
>
> "At all of those times before any stock was ever issued in the name of Mr. Harvey, he stated to me that he had given the stock to Mrs. Harvey. After the stock was issued, we discussed it a number of times, and he told me he had given it to Mrs. Harvey. . . . The reason that I, knowing these facts, permitted him to sign a document, 'we, the undersigned owners and holders of the number of shares of stock,' etc., was because the

stock showed on the books of the corporation in Mr. Harvey's name, and I deemed it advisable, in order to make the thing show as being a legal document, that it be signed by Mr. Harvey, and I advised Mr. Harvey at that time to sign the document" (Trans., pp. 97-98).

1906.—MR. CHARLES W. FAY, now Postmaster of this City and County, testified as follows:

"I am the general manager of the Shore Line Investment Company. I have held that position since January, 1906. I met Mr. Harvey very frequently. . . . Mr. Harvey told me at this time that this stock was Mrs. Harvey's. This was in 1906" (Trans., p. 164).

1907.—MRS. WARD BARRON testified as follows:

"I am the daughter of Mrs. J. Downey Harvey. During the winter of 1907 I resided with my mother in Monterey. We were there for two or three years at the Hotel Del Monte. During that time I had some conversation with my mother about my father's affairs. . . .

"My mother was worried very often about the affairs of the Ocean Shore, and I asked her if she did not have anything of her own that would be very valuable, *and she said that she had shares in the Shore Line Investment Company,* and those, Mr. Harvey told her, were going to be very valuable some day. This conversation took place in 1907, and several times after that" (Trans., p. 174).

1907.—EDWIN A. WASSERMAN, former bookkeeper of Mr. Harvey, testified as follows:

"At the time the assessment of the stock was paid,—I do not know the exact date, but it would show in the book, —I remember distinctly about asking Mr. Harvey about a receipt or entry for that assessment, and he told me that Mrs. Harvey—she, I think, was away at the time—that when she came back he would have the receipt entered on the stock. It was my habit when Mr. Harvey paid an assessment, to have the receipt entered on the back of the stock. Mr. Harvey told me that Mrs. Harvey had posses-

sion of the stock at this time when the assessment was paid. This date was April 13, 1907. I made the entry on page 44 of Mr. Harvey's ledger showing the payment of this assessment" (Trans., p. 116).

1907.—JAMES W. CROSBY, afterwards Mr. Harvey's bookkeeper but who in 1907 was in the employ of Shore Line Investment Company, testified as follows:

"I was in the employ of the Shore Line Investment Co. at the time that the assessment was paid in 1907. I had a conversation with Mr. Harvey at this time. . . . I do not remember the exact conversation, but he brought me a check in payment of the assessment. He told me at that time that it was to pay the assessment on Mrs. Harvey's stock, that Mrs. Harvey was away at the time and consequently he could not get the certificates, but he would bring them to me later to have the notation 'assessment paid' stamped or written on the back of the certificates. This was done at a later day" (Trans., pp. 127-128).

1905-1908.—MR. WASSERMAN testified further to the following very significant circumstance:

"I remained in Mr. Harvey's employ until about the middle of 1908. . . . While I was in Mr. Harvey's employ I had access to his safe where he kept stocks and bonds and papers of that character. We had two safes at that time, in his office, one was a personal safe of Mr. Harvey's and the other was the safe of the Martin Estate. At all times, commencing with 1905, I had access to all compartments of Mr. Harvey's safe, except one compartment which was held by a friend of Mr. Harvey's who was in the office. All the rest of the safe was used by Mr. Harvey. I also went quite frequently to Mr. Harvey's safe deposit box.

"I went there a great many times for the purpose of checking up the assets in that box. This box was in the First National Bank at Bush and Sansome Streets. During each year at least, that I was in Mr. Harvey's employ, I went to this box and checked up the securities. At the time of the San Francisco Fire I went up to the office in the Columbian Building, opened the safe and gathered up

all our securities and papers that I thought were valuable. I took them down to an automobile which I had at that time, and out to Mr. Harvey's house. One block of papers I carried around for some time in a wallet, on my person, as I did not know whether Mr. Harvey's house would burn or not. This was the wallet within which Mr. Harvey had his securities, insurance policies and other valuable papers.

"I never saw any stock of the Shore Line Investment Company in Mr. Harvey's custody, either in his office safe, or in his safe-deposit box, or at the time that I took his securities to his house. At no time between the year 1905, and the time that I left Mr. Harvey's employ in 1908, did I see any certificates of stock of the Shore Line Investment Co. in the custody or control of Mr. Harvey" (Trans., pp. 116-118).

1909.—CHARLES W. FAY further testified as follows:

"I recall the circumstance of a negotiation with reference to paying off some indebtedness of the Shore Line Investment Company, in 1909. As General Manager of the Shore Line Investment Company, I was authorized to negotiate for a loan to clean up this indebtedness. I negotiated with a certain banking institution here, and one of the conditions was that the stock of the various stockholders, or at least 90% of them was called for, for the purpose of securing this loan. Also, that an agreement should be signed by the owners of the stock, holding themselves proportionately liable for the amount to be borrowed. I called on Mr. Harvey and asked him for the stock held in his name in this Company, explaining my purpose. He said he would get the stock; that it was Mrs. Harvey's stock. I asked him how long it would be, and he said he would have to send for it; I believe that Mrs. Harvey was then at Del Monte. Two or three days subsequently I called on him and he gave me the certificates of stock standing in his name, endorsed" (Trans., pp. 164-165).

"When Mr. Harvey gave me those certificates, as I previously testified, they bore his endorsement on the back. The earliest date that I saw these certificates was the latter part of October or the first part of November, 1909. They were not endorsed to Mrs. Harvey, but simply in blank, as I recall them" (Trans., pp. 175-176).

Upon the foregoing testimony it is perfectly clear that the delivery of this stock to Mrs. Harvey took place in 1905.

> "The effect of the evidence of consistent statements is that the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story. This use of former similar statements is universally conceded to be proper."

Wigmore on Evidence, Sec. 1129, Vol. II.

> "It is contended by the appellants that all statements . . . of admissions made by John W. Holland *that he had given the stock to his wife* are inadmissible. It must be borne in mind that the statements of John W. Holland, sought to be excluded, *were made by him when he was entirely free from debt.* The question is, therefore, whether declarations of a husband, who is free from debt at the time the declarations are made, are admissible to prove a gift in favor of his wife. Upon well-settled principles, we answer this question in the affirmative. Not only was the gift in question made when the donor was free from debt, but his declarations touching the gift were practically contemporaneous therewith, and made when, as shown by the record, from the nature of things, he could have had no suspicion of the financial difficulties in which he was subsequently involved by the speculations of his brother. . . .
>
> "To hold inadmissible the declarations of the husband made under the circumstances of the case in judgment, would be, as said by the learned judge of the circuit court, to defeat a class of benefactions which, under certain conditions, are not only lawful, but are in a high degree commendable."

First National Bank v. *Holland,* 39 S. E., 126, 128.

Unless not only Mr. and Mrs. Harvey, but also the Postmaster of San Francisco; together with a

reputable member of this Bar; and two young bookkeepers and a young matron (whose simple story of her mother's declarations made to her in 1907 stand out in sharp contrast to what a perjurer would likely have brought to the aid of the mother under such circumstances)—unless all these witnesses have falsified themselves,—there is no excuse for doubting that this stock was given over to Mrs. Harvey in 1905.

And yet, in the face of all of this testimony the learned Judge of the trial court has held that this stock was never given to Mrs. Harvey in 1905, or at any time prior to November 26, 1909.

The meaning of such a decision—its effect upon the reputations of the parties involved—is obvious.

Without hesitation we therefore ask the Court to examine with critical and unusual care into the reasons assigned by the learned Judge of the court below for refusing to accept as true the statements of Mr. and Mrs. Harvey.

First as to Mr. Harvey:

THE REASON OF THE TRIAL COURT FOR REJECTING MR. HARVEY'S TESTIMONY.

The trial court admitted in evidence, over the strenuous objections of the defendant, the minutes of certain Stockholders' and Directors' meetings of the Shore Line Investment Company; also a letter written by Mr. Wasserman—Mr. Harvey's bookkeeper—to Mr. Harvey; and also certain entries from the private books of Mr. Harvey. *This documentary matter con-*

stitutes the evidence upon which the Court has refused to accept Mr. Harvey's testimony as true.

It will be noted by the Court that these books and papers were not introduced for purposes of impeachment. *They were offered and received in plaintiff's case in chief as substantive evidence tending to prove that no gift had been made to Mrs. Harvey prior to November 26, 1909.*

Later on in this brief we shall make it plain that the admission of this evidence was erroneous; but for present purposes we shall assume that it was properly before the Court. The immediate question, therefore, is, What weight should these transactions have against the testimony of Mr. Harvey that in 1905 he endorsed and delivered these certificates to his wife with the intention of making a gift of the stock which they represented?

We shall first consider the matters disclosed by the minutes of the meetings of the Stockholders and Directors of the Shore Line Investment Company. These minutes, if properly receivable in evidence, would establish the following acts and transactions, which the learned trial Judge has considered to be potent facts to overthrow Mr. Harvey's testimony as to the date of the gift:

1. Notwithstanding Mr. Harvey's testimony that he had already endorsed and delivered to Mrs. Harvey these certificates of stock representing 546 shares, Mr.

reputable member of this Bar; and two young bookkeepers and a young matron (whose simple story of her mother's declarations made to her in 1907 stand out in sharp contrast to what a perjurer would likely have brought to the aid of the mother under such circumstances)—unless all these witnesses have falsified themselves,—there is no excuse for doubting that this stock was given over to Mrs. Harvey in 1905.

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1. Notwithstanding Mr. Harvey's testimony that he had already endorsed and delivered to Mrs. Harvey these certificates of stock representing 546 shares, Mr.

Harvey continued to hold the stock in his own name on the books of the corporation.

2. On the 3d day of January, 1906, Mr. Harvey was elected President of the Board of Directors of the Corporation and has been its President ever since (Trans., p. 88). The only stock standing in his name prior to June 1st, 1909, was the 546 shares of stock here in dispute.

3. As a stockholder at stockholders' meetings, Mr. Harvey voted the 546 shares of stock thus standing in his name.

4. At a meeting of the Board of Directors held on April 25, 1907, Mr. Harvey was present. It appears from the minutes that Mr. Harvey, with others, signed his name to an assent to an amendment of the By-Laws, which assent contained the following phraseology: "We, the undersigned, stockholders of the Shore Line Investment Company," etc. (Trans., p. 89).

5. At a meeting of the stockholders held June 2, 1907, Mr. Harvey was present and acted as Chairman of the meeting. He represented in person 480 of these 546 shares of stock, being all of this stock standing in his name at the time (Trans., p. 90).

6. At an adjourned meeting of the Board of Directors held November 27, 1906, at which meeting it appears that Mr. Harvey was present, a resolution was adopted that the Articles of Incorporation be

amended by and with the written consent of stockholders representing two-thirds of the subscribed capital stock (Trans., p. 91).

Mr. Harvey signed said written consent. It begins with the phraseology: "We, the undersigned, being "the owners and holders of the number of shares of "the capital stock of the Shore Line Investment Com- "pany set opposite to each of our respective names, "and representing and owning more than two-thirds "of the subscribed and more than two-thirds of the "issued capital stock," etc. Opposite Mr. Harvey's name, under the heading "Number of Shares of Stock," appear the figures "546."

7. At a stockholders' meeting held on May 4, 1909, Mr. Harvey acted as President; that Mr. Harvey voted the said 546 shares of stock as a stockholder.

THE UTTER INSUFFICIENCY OF THE FOREGOING CIRCUMSTANCES TO DISCREDIT MR. HARVEY'S TESTIMONY.

Giving to the foregoing facts and circumstances every reasonable inference, we respectfully insist that they are utterly insufficient to raise the slightest question as to the truth of Mr. Harvey's testimony to the effect that at all of these times this stock belonged to his wife.

It is the usual, rather than the unusual thing for stock in corporations to stand on the books in the names of persons other than those who actually own the shares represented by the stock certificates. It

may probably be said with perfect truth that 90 per cent. of the stock of corporations in this country is so held. Nor is it at all unusual for persons having no beneficial interest whatever in stock standing in their names to act as Directors and Officers of corporations. These are facts of common knowledge. Mr. Folger so acted as a director of this very corporation.

The fact that the stock belongs to a wife and that the husband is acting in her interest and as her representative is a good and sufficient reason why a husband should assume the presidency of such a corporation. And yet it will be noted that the learned Judge of the court below lays stress upon the fact that Mr. Harvey continued to act as *President* and *Director* of this Corporation after he claims to have parted with this stock (Trans., p. 31).

It is a smiling commentary upon the utter inconsistency of the learned Judge's reasoning, that Mr. Harvey is to-day the President of this same corporation, although the ten shares standing in his name and by virtue of which alone he is legally qualified to be such officer, were delivered to Mr. Stowe, the plaintiff in this very action, over three years ago! No sane man would contend that the fact that Mr. Harvey is to-day the President and a Director of the Corporation and that he holds in his own name these ten shares of stock upon the books of the corporation, contradicts in the slightest degree the truth of the testimony that

the plaintiff Stowe, trustee and receiver in bankruptcy, has for several years past, had these ten shares of stock in his custody and possession (Trans., pp. 95-96). And yet, through some mistaken process of reasoning, the learned Judge of the court below holds a similar circumstance to be sufficient to cast doubt upon the veracity of a man who though a bankrupt, is not shown to be a man in any way wanting in personal integrity!

Next as to the point that Mr. Harvey continued to vote this stock: That he had a legal right to vote it, cannot be questioned. When he purchased the stock and it was issued to him, he became a *bona fide* stockholder upon the books of the corporation and continued to be such—although he had given away the stock—until the transfer of these shares into the name of Mrs. Harvey.

A *bona fide* stockholder is not necessarily the *owner* of stock; and one who becomes a *bona fide* stockholder does not cease to be such by the endorsement and delivery by way of sale or gift of the stock certificate to another, although he may cease thereby to be the owner (*Smith* vs. *S. F. N. P. Ry. Co.,* 115 Cal., 593). The fact that Mr. Harvey voted this stock as a stockholder is therefore not inconsistent with his testimony that he had endorsed and given the certificates of stock to his wife.

The same is true with regard to the signature of Mr. Harvey to the amendment of the By-Laws. He was a lawful *stockholder,* though not owning the

shares, and as such stockholder could give a valid assent to the amendment of the By-Laws (*Smith* vs. *S. F. N. P. Ry. Co., supra;* Civil Code of Cal., Section 304).

Mr. Harvey's signature to the amendment of the Articles of Incorporation stands upon a like footing. The Civil Code (Section 290) provides that an amendment such as was here made, may be brought about by a majority of the *stockholders* of the corporations. Mr. Harvey was a stockholder, as that word is used in law. In company with others he signed the consent beginning with the words: "We, the under-"signed, being the owners and holders of the number "of shares of the capital stock of the Shore Line "Investment Company set opposite our respective "names," etc.

Critically construed, Mr. Harvey's signature to this document does not even constitute a formal declaration that Mr. Harvey was the owner of this stock. The requirement of the recital is fulfilled if some of those signing were the owners in fact of stock, while others were stockholders upon the books of the corporation. But be this as it may, Mr. Corbet, a member of this Bar and Secretary of the Corporation, testified that he had been informed by Mr. Harvey at the time this document was signed (December 27, 1906) that the stock standing in Mr. Harvey's name belonged to Mrs. Harvey, and not to Mr. Harvey. He drafted the document and was acting as the legal

adviser of the Corporation (Trans., p. 98), and he testified:

> "The reason that I, knowing these facts permitted him to sign a document, 'we, the undersigned owners and holders of the number of shares, etc.,' was because the stock showed on the books of the corporation in Mr. Harvey's name, and I deemed it advisable, in order to make the thing show as being a legal document, that it be signed by Mr. Harvey, and I advised Mr. Harvey at that time to sign the document" (Trans., p. 98).

We have already called attention to the fact that these minutes were not offered to impeach Mr. Harvey; they were offered as substantive evidence in plaintiff's case in chief to prove that the stock had never been delivered to Mrs. Harvey prior to November 26, 1909. But even if they had been offered for the purpose of impeachment; i. e., to show that he had made statements and performed acts inconsistent with his present testimony—they would far fall short of that effect or tendency.

The relationship of Mr. Harvey to Mrs. Harvey instead of making it improbable that after the gift of this stock to her, he would continue to participate in the active management of the affairs of the corporation, afford a most excellent reason why he should so continue to act.

In this same connection Mr. Harvey gives the following explanation as to why he deemed it to the best interests of Mrs. Harvey that he should continue to act as stockholder and officer of the corporation:

> "And I said to her that the reason I am retaining them in my name is that I am very largely interested in the

Ocean Shore Railroad, and these two companies are associated in the development of one another, one depends upon the success of the other. If I keep this stock in my name, which I will want to do, I will show the people that the Ocean Shore Railroad is interested in the success of this land company, and that I am a large holder in it and that at all times I will be ready to help out Granada as much as we can . . . (Trans., pp. 149-150). . . . The reason that I did not have these shares of stock transferred to Mrs. Harvey in 1905, was as I have testified, that we had just formed these two companies, and the Shore Line Investment Company depended upon the building of the Ocean Shore Railroad. I was the largest stockholder in both companies and thought that my association and prominence with the Ocean Shore Railroad would help the Shore Line Investment Company. There was a great deal of rivalry down that way as to this land business, and if we could make an association between the two, it would make the people who purchased at Granada feel that they were going to get a good railroad service, and if there was any favoritism or help to be had from the association with the railroad, we wanted to get it. If I was not connected with the Shore Line Investment Company, its position would be just the same as the other companies not associated with the railroad. There were other real estate companies formed. There was one called the Ocean Shore Land Company, which was very misleading, and it made many people believe that the Ocean Shore Railroad Company was interested in the development of the Ocean Shore Land Company. They took half our name and used half our name to designate their business, but we had no association with them whatever. There were several things arising like that so that it afterwards turned out to be of immense benefit that I retained my identity as a stockholder in the Shore Line Investment Company" (Trans., pp. 156-157).

So much as to the question of the acts and conduct of Mr. Harvey, as shown by the minute books of the Shore Line Investment Company.

MR. HARVEY'S BOOKS OF ACCOUNT DO NOT TEND TO SHOW THE CONTINUED POSSESSION OF THIS STOCK BY MR. HARVEY.

We shall next consider the evidence adduced from Mr. Harvey's books of account. The Court will bear in mind that the sole fact here in issue was as to whether or not there had been a delivery of the possession in 1905 of these certificates of stock. Upon what we shall show to be an erroneous theory of the law, the Court admitted these books in evidence, *not for purposes of impeachment but as a part of plaintiff's case in chief and as substantive evidence of the fact that this stock had not been delivered to Mrs. Harvey but was in the possession, not of Mrs. Harvey but of Mr. Harvey until November 26, 1909.* We shall make it clear that as to Mrs. Harvey these entries were irrelevant, incompetent, hearsay, and *res inter alios acta.* But let us assume for the present that they were properly received in evidence. What is their effect?

To say the least, Mr. Harvey's books were not kept in businesslike fashion. Sometimes they were not written up for intervals of a year or eighteen months; and the books themselves, for several years, were kept, not in Mr. Harvey's custody but at the home of Mr. Crosby (Trans., pp. 121-122).

These books—what appeared therein, no more than what did not so appear—seem to have made a deep

impression on the trial court. The learned Judge says in his opinion:

> "The stock was carried in his private books of account—his journal, ledger, and trial-balance book—as his individual property.
>
> "Prior to November, 1909, there was not a suggestion in these books that the stock belonged to Mrs. Harvey. April 15th, 1907, Harvey paid an assessment of $10 per share, or $5,460, on this stock. This amount was not charged to Mrs. Harvey, though less than two months before he had paid a $500 assessment on her Ocean Shore stock, with which she was debited. January 11th, 1907, he gave his wife $200 in cash; this also was charged against her. Mr. Harvey explains this circumstance by saying that he intended that $5,460 as a gift; but notwithstanding this intention this very $5,460 appears among his assets in his trial balances for February, 1908, and March and October, 1909; and also in the statement of his affairs, which was prepared at his request by his bookkeeper September 22, 1907. Mr. Harvey attempts to avoid the obvious inference from these entries by saying that his attention was entirely engrossed with the affairs of the Ocean Shore Railway Company" (Trans., pp. 31-32).

If the matters referred to by the trial court stood alone without explanation, they might, if admissible in evidence at all against Mrs. Harvey, tend to cast a doubt upon the correctness of Mr. Harvey's testimony as to the delivery of the gift of this stock to Mrs. Harvey. *But they do not stand alone and unexplained.* On the contrary, we have the significant circumstance that although these 546 shares of Shore Line Investment Company stock was transferred into the name of Mrs. Harvey on the Company's books on November 26th, 1909, and although the plaintiff himself avers, and it is a conceded fact in this case, that it was actually given to her on November 26th,

1909; nevertheless, there is no entry whatever having reference to the gift until more than four months later, when, under date of March 31, 1910,—not 1909 as the trial Court mistakenly says—the entry appears under the caption "Family Gifts and Allowances" (Trans., p. 123). And let it be noted, moreover, that while this entry is dated March 31st, 1910, it seems probable that it was not actually written in the book until some seven months later—after the inauguration of the bankruptcy proceedings in November, 1910 (Trans., p. 120).

Look at the illogical position to which the reasoning of the learned trial Judge leads: Here we have the plaintiff alleging that this stock was given to Mrs. Harvey on November 26th, 1909; we have an actual transfer of the stock certificates on the corporate books on that day; there is no doubt about these facts. And yet no mention is made of this transfer in Mr. Harvey's books until the entries *dated* March 31st, 1910—over four months later—and which entries seem actually to have been made not on that date at all, *but in November, 1910.* If the failure to make these entries before March or November, 1910, does not prove that there was in fact no gift or transfer at least as early as November 26th, 1909—and of course it does not—why, in the name of reason, does that same failure to make that same entry prove that there was no gift as early as 1905?

The bookkeeper who kept all of these books and

made these entries had the books at his own home for several years (Trans., p. 122); he received no salary for his work on them (Trans., p. 120); he worked on them only on Sundays or in the evenings (Trans., p. 122); he made no entries for a year at a time (Trans., p. 121); he remembers that on one occasion he was 18 months behind in writing them up (Trans., p. 125); his work on these books began in 1908, and he testified: "I cannot say positively when: but some-"time in 1908 or 1909 he (Mr. Harvey) gave me "instructions to note at the head of the Shore Line "Investment Co. account in the ledger, that the stock "belonged to Mrs. Harvey" (Trans., p. 121; see also p. 120).

We submit that it is simply absurd to argue that the failure of this utterly inaccurate system of book-keeping to show the gift of this stock to Mrs. Harvey, is sufficient to overthrow Mr. Harvey's testimony.

Next as to the assessment entry: It is true that under the head "Family Gifts and Allowances" there is an entry "To Cash, Mrs. Harvey, O. S. Assessment No. 3, $500" (Trans., p. 101). It is also true that on page 44 of the same ledger in the accounts of shares of stock of the Shore Line Investment Co. which we have already considered, is the item "To Cash, Assessment No. 1, 546 shares at $10, $5460" (Trans., p. 100).

But we have already shown that it was not significant of any untruth in Mr. Harvey's sworn testimony,

that his bookkeeper failed to record the gift to Mrs. Harvey until 1910,—months after even the plaintiff himself avers that it was actually made. This assessment was a part of the same thing, and what has been pointed out is of itself a sufficient answer to the point.

Moreover, there is other evidence relating to this assessment which is equally satisfactory for the purpose of showing how little justification there is for the harsh inference which the trial court has drawn. Not only did Mr. Harvey testify, but both Wasserman and Crosby—witnesses called by plaintiff himself—testified that at the time this assessment was paid—April 13, 1907—Mr. Harvey declared to them that the stock belonged to Mrs. Harvey; that the certificate was not in his possession, and therefore could not then be stamped "assessment paid," but that he would later on get the certificates from Mrs. Harvey on her return from the East and then have the payment of the assessment properly stamped thereon; and that this was subsequently done (See testimony of Mr. Harvey, Trans., p. 161; testimony of Mr. Wasserman, Trans., p. 116; testimony of Mr. Crosby, Trans., p. 128).

In the face of this testimony, of what consequence is it that the bookkeeper did not at once charge this assessment on the books as a gift to Mrs. Harvey? Under date of March 31, 1910, he balanced the account containing the entry of this assessment, with the following entry: "March 31, 1910, Family Gifts

and Allowances, $23,610.00,"—which was the entire cost to Mr. Harvey of the Shore Line Investment stock including this assessment. Even the plaintiff says that this gift was made in 1909, and not in 1910. Why, in the name of common sense, may it not just as well have been made at the time all of these witnesses testify it was made? The ease with which the presumption that witnesses speak the truth has been overthrown in this case, is we think without a parallel.

The only remaining circumstance of alleged significance is as to Mr. Harvey's trial balances, in which this stock is carried as an asset of Mr. Harvey's from December 31, 1905, to December 31, 1909. Mr. Harvey testified that he did not examine this book or know anything about these entries (Trans., p. 159). And Mr. Crosby testifies that he kept the book at his house. But even if Mr. Harvey had known all about the presence of these entries, the matter would have been of no significance, *for the simple reason that another asset, which had beyond question been given to Mrs. Harvey, was carried upon the books as an asset belonging to Mr. Harvey* by a similar erroneous method of bookkeeping. In this connection Mr. Harvey testified:

> "I bought her a lot on Pacific Avenue where we intended to build.
>
> "Referring to my trial-balance book I find that the Pacific Avenue lot was carried as my asset from March 31, 1905, up to July 31, 1905, in the year 1906 it is omitted. The books are not correct as to this lot, because I gave it to Mrs. Harvey on February 28th, 1905, and according to this book it still belonged to me in July 31, 1905. The

Pacific Avenue lot appears in the trial-balance book as my asset until December, 1905, and then it is dropped, but the Shore Line Investment Company is carried as an asset in my trial-balance book all the way through" (Trans., p. 161).

"From my examination of my books, concerning the gift of a lot to Mrs. Harvey, the item was carried, according to the trial balance, as my property until December in 1905, and the gift was made on the 28th day of February, 1905. This was the Pacific Avenue Lot" (Trans., p. 164).

Here is a case where the property was actually deeded to Mrs. Harvey February 28th, 1905; and yet the same is carried as an asset of Mr. Harvey's until December, 1905.

In the case of the lot there is, fortunately, an actual instrument of transfer which this error in bookkeeping cannot impeach. There was, unhappily, no recorded instrument of transfer in the case of this stock. But how books shown to have been thus erroneously kept can be held to be sufficient ground for branding as a perjurer a witness whose reputation for veracity is not otherwise questioned, must depend upon a new system of logic not heretofore met with in jurisprudence.

We urge upon the Court a careful reading of the testimony of Mr. Harvey and his two bookkeepers in relation to these books of account. We respectfully insist that this Court will not be able to find, after a careful perusal and consideration of this testimony, the slightest logical justification for questioning the veracity of Mr. Harvey with regard to the making of this gift.

The Wasserman letter. The final item which, in the opinion of the Court below, was substantive evidence of the ownership of this stock by Mr. Harvey—not matter of rebuttal or impeachment, the Court will observe—is a letter written by Mr. Wasserman, the bookkeeper, to Mr. Harvey, under date of September 22, 1907.

That there was obvious error in the admission of this letter as substantive evidence to prove that this stock had not been delivered to Mrs. Harvey—that it was incompetent and irrelevant as against her, we shall make clear later on in this brief; if, indeed, its hearsay character is not already obvious to the Court. But assuming for the present that it was admissible, it comes to this: In this letter (Trans., p. 103) Wasserman writes that he has gone over Mr. Harvey's accounts, sets out Mr. Harvey's liabilities and interest charges, shows the average monthly income, and then continues: "Following is a list of your assets." After enumerating as assets various properties, the letter proceeds: "Besides the above, you should take into "consideration the following: . . . Shore Line "Investment, $23,610. Following Nevada Mining "Ventures representing cash paid in" (here follows certain items) "Bullfrog Banner, less one-half given S. G. H., $1500.00."

Whether the writer of the letter considered this item as an asset or as an item of doubtful value to Mr. Harvey—merely something that "should be taken into

consideration,"—is of small importance. The witness thought he had mentioned the letter to Mr. Harvey after he had sent it to him. Being asked "What was said at the time, if you remember?" he answered, "I "think I told Mr. Harvey that in view of his condi- "tion something should be done to reduce his liabili- "ties, the interest charges and liabilities."

Q. "He had no suggestions to make in regard to the letter, did he? A. No." (Trans., p. 109).

This letter presents, we submit, a ~~miserably~~ very attenuated line upon which to write down as a perjurer the man who has testified that in the fall of 1905 he endorsed the certificates of the Shore Line Investment Company stock and deliverd them as a gift into the custody of his wife. Even if his bookkeeper had never, before writing that letter, heard of this transaction between husband and wife, that fact would have been of no real significance. Nor is it impossible that he had heard it and forgotten it. Does this Court hold that it is usual or customary when a husband hands to his wife in his home a certificate of stock as a gift, for him to rush to his bookkeeper to have the transaction entered up? Are not the chances 99 out of a hundred that he would not do so? But be that as it may, Mr. Wasserman, the very man who wrote the letter in question, testifies that before he wrote it—specifically, on April 13, 1907—he had been informed by Mr. Harvey that this stock belonged to

Mrs. Harvey and was then in Mrs. Harvey's possession (Trans. p. 128).

It is a serious thing to adjudge a man guilty of any attempted fraud; it is a far more serious thing to hold that he has deliberately and wilfully borne false witness. Reputation hangs by a fickle title indeed, if it can be torn and shattered in our Courts of Justice by harsh deductions, false logic, and undiscriminating analysis.

Concluding our discussion of Mr. Harvey's testimony, we submit that the books may be searched in vain for a case where any witness otherwise unimpeached—let alone a witness so supported by corroborating evidence, has had his testimony overthrown and his integrity torn from him, upon so flimsy and utterly equivocal a basis as is afforded by the Wasserman leter, the Harvey books of account, and the transactions noted in the minutes of the Shore Line Investment Company.

ANALYSIS OF MRS. HARVEY'S TESTIMONY.

The doubt cast upon Mrs. Harvey's testimony by the trial Court centers in this circumstance: On December 5, 1911, before the Referee in Bankruptcy, she testified that she placed the certificates given to her by Mr. Harvey in her safe deposit box; and two weeks later, under circumstances which will hereafter appear, corrected this testimony by saying that she kept the said certificates in her private safe, first at her home and afterwards in Monterey.

Her testimony on Dec. 5, 1911, was as follows:

> "In 1905 Mr. Harvey told me he was going to give me some stock in the Shore Line Investment Company. He gave me in June of that year 300 shares. He told me as he acquired more he would give it to me. . . . In August he gave me 66 shares. In September he gave me 160 shares and 20 shares, and I put them in my box. . . . (Trans., p. 133). I put the certificates in the safe deposit of the First National Bank, where I always have a box. . . . The first of these certificates was given to me in June, 1905. . . . He actually delivered me a certificate of stock at that time and he said I was to take it and put it in my box and I took it at that time and put it in my box (Trans., pp. 134-135).
>
> "In December, 1906, Mr. Harvey stated he wanted the stock certificate for 66 shares to make Mr. Folger a Director. I went to my box and got the certificate and gave it to Mr. Harvey. I received it back again endorsed by Mr. Folger's name and put it in my box (Trans., p. 134). . . . It was endorsed by Mr. Folger's name. The stock stood in Mr. Folger's name while he was acting as a Director, but I had the endorsed certificate in my safe-deposit box (Trans., p. 135).
>
> "In December Mr. Folger went out of the directorship of the Shore Line Investment Co. and I got the certificate endorsed by Mr. Folger and gave it to Mr. Harvey. He gave me another one endorsed by himself and I put it in my box" (Trans., p. 133).

The last of the transactions thus testified to—the Folger transfer—had occurred four years before this testimony was given. The other transactions had occurred from five to six and one-half years before. The first event antedated San Francisco's great fire.

We request the Court to note that on this occasion, when Mrs. Harvey appeared before the Referee, she was not asked any questions as to where she had kept this stock during the preceding four years. She was not asked from what place or receptacle she had

obtained the certificates in November, 1909, prior to their transfer on the books into her name in that month; nor was she asked where she had kept the certificates since their issuance in her name. None of these or similar questions which might have directed her attention to more recent facts which, by associations, might have refreshed her memory as to the older transactions, were asked of her.

After Mrs. Harvey had thus testified before the Referee, the creditors of Mr. Harvey set about making inquiries as to the dates of Mrs. Harvey's visits to her safe deposit box. The fact that this effort was being made to discredit her testimony coming to her knowledge, Mrs. Harvey gave these events—all of which had happened from four to 6½ years before —more deliberate thought. She recalled that instead of placing these certificates in her safe deposit box, she had placed them in a safe which she at all times had with her, both in San Francisco and in Monterey. She also realized that she had made an error in her evidence in another particular, and thereupon, for the first time, consulted with counsel (Trans., p. 168), and upon the counsel's advice she addressed a note to the attorney for the creditors, reading as follows:

"San Francisco, December 19, 1911.

E. H. Williams, Esq.,
San Francisco, California.

Dear Sir:—

If you wish to learn from the safe deposit company the dates on which I visited my safe deposit box, I have no objection whatever, and am perfectly willing that the bank officials shall give you the information, and you may tell

them so for me. I do not myself know the exact dates of my visits. I have, of course, been there a number of times since 1905; but I have at all times had a safe of my own wherever I have been living, whether here or at Monterey, and I kept many of my papers in [123] these safes, and, as I think it over, I am positive I kept my certificates of stock there instead of in my safe deposit box. I also forgot for the moment and omitted to tell you when on the witness-stand, of the sale by Mr. Harvey to me of 200 shares of Philippine Telephone & Telegraph stock in March, 1910. This stock was worth about $20 per share, and the transfer to me was a part of the same transaction whereby I purchased the Visitacion Valley Lots, the Beach Company's stock and other property enumberated by me in my testimony, but this Philippine stock had slipped my mind and I forgot to mention it. Should you, or Commissioner Kreft, wish me to correct my testimony in these particulars, I will, of course, do so gladly. S. G. HARVEY."
(Trans., pp. 138-139.)

After writing this letter, Mrs. Harvey was, on January 5, 1912, again called to the stand before the Referee in Bankruptcy. On that occasion she testified:

"During the year 1905 I did not have in my safe deposit box the shares of the Shore Line Investment Co. I made a mistake in my testimony and want to correct it. On thinking it over I kept this stock in my own safe in my house" (Trans., p. 142).

"I kept in my box letters and things of that sort. Sometimes shares, sometimes not. I did not have any shares of stock of the Shore Line Investment Company in that box during the year 1905. I made a mistake in my testimony. That is the reason I want to correct it. I never had any shares of stock of the Shore Line Investment Company in my box at any time. I kept that stock in my own safe. I had other papers during the years from 1905 to 1910, but I don't think I had any other shares of stock in the safe deposit box" (Trans., pp. 136-137).

It is, we submit, a most common and natural thing that a person having one or more places where valuables are kept, should fail to recall with exactness

into which of the receptacles a certain article has been placed. False impressions and lapses of memory in such matters are of frequent occurrence with all, save perhaps, a few very extraordinary individuals. With much respect, we venture even to suggest that under similar circumstances, precisely the same confusion of ideas might occur to either one of your Honors after the lapse of a like number of years. Mrs. Harvey's own explanation given upon the trial of this case ought, we insist, under all the circumstances, to be entirely satisfactory. She says:

> "I went over the transaction in my own mind in a certain vague way. I did not know what questions I was going to be asked and I answered just as I then remembered. I thought at that time I had put this stock in safe deposit. There was also mentioned in the letter an item which I had omitted and which I did not recall upon the stand, and that I also put in my letter. After I had written the letter I went on the stand and made correction of my testimony" (Trans., p. 169).

That Mrs. Harvey's fault was due to lack of accurate memory, and not to deliberate perjury, is inherently demonstrable from a portion of her testimony which had no conscious bearing upon this point when it was given. It will be noted that she had not visited her safe deposit box from the time that she gave her testimony before the Referee on December 5, 1911, until she had again appeared before him on January 5th and January 12th, 1912, for the purpose of correcting her testimony (Trans., p. 143).

She had not refreshed her memory as to the con-

tents of her safe deposit box by an inspection thereof. She was therefore dependent for an enumeration of the things that were in the box upon her memory alone. She had returned to the stand on January 5th and January 12th, 1912, for the very purpose of correcting her former testimony. She had every inducement to give an accurately truthful statement concerning the contents of her box. There could be no possible motive for misrepresentation in that particular. On these dates—January 5th and January 12th, 1912—she declared repeatedly before the Referee that she had no stock whatever, representing shares in any corporation in her safe deposit box, and that she had had none therein at any time between 1905 and 1910 (Trans., pp. 137, 138, 139, 140 and 142).

And yet at that very moment she had in said box two certificates of the Bullfrog Mining stock, one of which was dated December 4, 1906; the other, April 8, 1908 (Trans., p. 173). These she discovered on visiting the box at a date subsequent to January 12, 1912. On the trial in the court below she testified:

> "Since that testimony was given I went to my safe deposit box. At the time I testified I could not recall anything more as being in that box except the articles I testified to, but when I went to the box I found other papers besides those letters, including two old deeds and another antique, two or three. I found Mr. Harvey's will and my own will. At the time I testified, I had forgotten both the wills and the deeds. There were no shares of stock in the box, except some Bullfrog mining stock. There was also a little envelope, which shows that I have some more stock on the books of that company. . . . I had no recollection on

the 5th day of December, or on the later day when I testified, that there was any Bullfrog stock in my safe deposit box."

The question was whether Mrs. Harvey's erroneous statement—afterwards corrected—was due to mere inaccuracy of memory as to transactions several years old, or wilful perjury. The foregoing evidence should satisfy any reasonable court, we emphatically insist, that defendant's memory alone was at fault. The psychology of the situation seems to be clear enough: Her certificates representing Bullfrog mining stock were dated December 4, 1906, and April 8, 1908. This stock she had placed in her safe. She had forgotten absolutely that she had ever placed any such stock there; but she had an indistinct mental impression of the fact that she had placed some stock there. When questioned about the Shore Line Investment stock—a transaction dating from approximately the same time as the Bullfrog transaction—she confused the two transactions. It was neither unnatural nor unreasonable nor absurd that she should have done so.

In conclusion of this branch of the discussion, we respectfully submit that nothing can be said against the testimony either of Mrs. Harvey or Mr. Harvey that is sufficient in itself to overcome the presumption that these witnesses spoke the truth, and did not commit the crime of wilful perjury. Every circumstance relied upon to that end, if not wholly and completely and satisfactorily explained away, is in its most unfavorable aspect quite as consistent with honest mis-

take, as with wilful and deliberate falsification. It is susceptible of a construction favorable to truth and honesty. The presumption that a witness speaks the truth and that he is innocent of crime and wrong is not lightly to be overcome. The law in such cases is clear:

> "In actions involving fraud, as in other cases where the facts present a double aspect, one consistent with fair dealing and the other involving dishonesty of purpose, the court, unless the scale decidedly preponderates for the latter, will strike the balance in favor of honesty and innocence."
>
> *Jones' Commentaries on Evidence* (Blue Book 1913), Vol. 1, Sec. 13.

> "The presumption in favor of innocence, says a learned writer, is not confined to proceedings instituted with a view of punishing the supposed offense, but holds in all civil suits where it comes collaterally in question."
>
> *Case* v. *Case,* 17 Cal., at 600.

> "When, in the trial of a civil cause, a person is charged with fraud, dishonesty, or crime, there is a legal presumption that he is innocent, and he is entitled to have such presumption considered by the jury in connection with the evidence in the case."
>
> *Childs* v. *Merrill,* 29 At. Rep., at 533.

PALPABLE ERRORS IN THE ADMISSION OF EVIDENCE.

The complaint avers a gift of the stock here in question from Mr. Harvey to Mrs. Harvey on the 26th day of November, 1909 (Trans., p. 5). Mrs. Harvey, while admitting that the actual transfer upon the books of the corporation was made to her on

said date, denies that the gift was made at that time or at any time subsequent to the year 1905 (Trans., p. 15). At all stages of the proceedings her counsel conceded that if this gift had not been made until November, 1909, it would have been fraudulent as to Mr. Harvey's creditors, and plaintiff would be entitled to recover the stock (Trans., p. 146).

There is no issue of fraud involved. Mr. Harvey was entirely solvent in 1905 and if the gift was made in that year it follows as a matter of law that it was not fraudulent as to his creditors. If, on the contrary, the gift was made in November, 1909, it follows as matter of law that the gift was fraudulent. The sole issue to be tried, therefore, *is not an issue of fraud,* but *a plain issue as to a single fact,* viz.: In what year—1905 or 1909—was this stock actually delivered over to Mrs. Harvey?

As already noted in our discussion of the facts, *supra,* the plaintiff offered as substantive evidence, *for the purpose of showing that Mr. Harvey did not part with the possession of this stock prior to 1909,* the following documentary evidence:

1. Minutes of meetings of the Shore Line Investment Company, beginning with January 3, 1906, and ending with May 4, 1909.

2. The account books of Mr. Harvey, covering entries made from 1905 to 1910, inclusive.

3. A letter from Mr. Wasserman, bookkeeper of Mr. Harvey, dated September 22, 1907.

The admission of this evidence, if improper, was manifestly prejudicial, for it is clear that the learned Judge of the trial court relied much upon it, as is evidenced by his opinion (Trans., pp. 31-36).

Mr. Harvey was made a party to this action, and appeared by his counsel and filed a disclaimer. Mrs. Harvey, through her counsel—who were not the same counsel who represented Mr. Harvey—appeared and answered. The issue was therefore solely between Mrs. Harvey and the plaintiff. To what extent, then, were the acts, transactions and declarations of Mr. Harvey, subsequent to 1905, admissible as substantive evidence against Mrs. Harvey for the purpose of proving that there had been no delivery of these shares to her prior to November 26th, 1909?

With the following propositions of law the Court is, of course, thoroughly familiar:

> 1. "The relevant admissions or declarations of the assignor, vendor, or holder of personal property, *made before the sale, assignment, or other disposal of his interest* are evidence against his vendee, assignee, or other person claiming under him."
>
> *Jones' Commentaries on Evidence* (Blue Book 1913), Vol. 2, Section 244.
>
> 2. "The declarations of a debtor *while in possession of personal property* after a sale or transfer by him, which show fraud in the transfer, are admissible against the vendee in favor of creditors."
>
> *Jones' Commentaries on Evidence* (Blue Book 1913), Vol. 2, Section 351.

3. *"It is indispensible that the declaration should be made while the declarant is in possession,* otherwise its admission as a part of the *res gestae* would be almost a contradiction in terms. It is because it is of the possession that it has the claim to admission."

Jones' Commentaries on Evidence (Blue Book 1913), Vol. 2, Section 351.

Two brief quotations will illustrate the application of these rules to both gifts and sales in California:

"Declarations of the vendor of personal property, *made before the sale,* are admissible for the purpose of showing a fraudulent intent on his part. . . . *But declarations made after the sale* stand upon a different ground, and cannot be received."

Jones v. *Morse,* 36 Cal., at 207.

"So far as it relates to the thirty-one head for which the plaintiff had judgment, the declaration sought to be proven was a declaration of the donor *after he had parted with the property,* and was inadmissible either to prove fraud or otherwise."

Walden v. *Purvis,* 73 Cal., at 519.

Innumerable authorities might be cited to the foregoing effect. There is no conflict in the books upon these questions.

Possession by the declarant is, therefore, the test for the admissibility of the declaration; *but the learned trial Judge holds that the declarations are the evidence with which to prove the possession itself.*

To admit them in evidence without proof that the declarant was in possession is simply to assume in plaintiff's favor the precise question at issue.

That is exactly what the learned Judge of the court below proceeded to do and did do. He says in his opinion:

> "Objection is made that the acts, conduct, and declarations of Mr. Harvey subsequent to the delivery of the certificates to Mrs. Harvey in 1905 are not admissible in evidence to impeach her title. This objection would be good if the actual physical delivery of the certificates to Mrs. Harvey at that date, and her exclusive possession thereafter, were conceded or established. This, however, is not the case. *Whether Mr. Harvey ever surrendered possession of the certificates, and gave the stock to her in 1905, is the controlling issue, and as to this the evidence is admissible*" (Trans., pp. 44-45).

Upon what principle, we respectfully ask, was the evidence admissible upon this issue? That it was not admissible we will now proceed to show seriatim.

THE MINUTES OF THE SHORE LINE INVESTMENT CO. WERE NOT EVIDENCE AGAINST MRS. HARVEY.

This evidence will be found on pages 87 to 93 inclusive of the Transcript, and the assignments of error relating to it on pages 59 to 62.

The acts and conduct of Mr. Harvey set forth in these minutes amount to no more than would a series of declarations by Mr. Harvey, written and oral, to the effect that he is the owner of this stock which stands in his name upon the books of the company. These declarations were not offered to impeach Mr. Harvey; they were offered and received in plaintiff's case in chief as substantive evidence to prove that he was in

possession of the stock because, forsooth, he, himself, declared that he was.

No case will be found in the books holding that the declarations of a person not shown to have been in possession at the time the declaration was made will be received in evidence to prove the fact of the possession. That such evidence is self-serving and hearsay, and for that reason irrelevant, is an elementary principle in the law of evidence.

Code of Civil Procedure, Section 1848.

THE ENTRIES IN MR. HARVEY'S BOOKS WERE NOT EVIDENCE AGAINST MRS. HARVEY.

For this evidence see Transcript, pages 99 to 103 and pages 119 to 125, and for the assignments of error, pages 63 to 65.

The entries offered were made not by Mr. Harvey in person, but by two bookkeepers. None of them are shown to have been made contemporaneously with the transactions to which they relate. His books were not written up for many months at a time. On one occasion at least, eighteen months went by before the books were written up.

The entries in the ledger, journal, and trial balances not having been copied from one to another "at or near the time of the transaction" were not admissible (Code of Civil Procedure, Section 1947). Such books would be excluded even in the cases where properly kept books with contemporaneous entries are admissible.

The United States Supreme Court sums up the rule as follows:

> "Their admissibility must, therefore, be determined by the rule which governs the admissibility of entries made by private parties in the ordinary course of their business.
>
> "And that rule, with some exceptions not including the present case, requires, for the admissibility of the entries *not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts,* and be corroborated by their testimony, if living and accessible."

Chaffee & Co. v. *United States,* 18 Wallace, at 540.

> "These entries were properly excluded. Upon their face they showed only that the trays had been shipped to one party and charged to another. This, upon its face, was consistent with a sale to defendants to be paid for by plaintiffs out of the proceeds of defendants' crop of raisins. The witness who made the entries had no knowledge of the facts. True, he was instructed by the manager to keep the account in that way. But why? He could not be permitted to testify that the manager said he sold the trays to plaintiffs. That would be hearsay; and, if so, any inference that might be drawn from the instruction to keep the account in a particular way must also be inadmissible."

Butler v. *Estrella Raisin, etc., Co.,* 124 Cal., at 242.

San Francisco Teaming Co. v. *Gray,* 11 Cal. App., 314, 104 Pac. Rep., 999.

But apart from that, even if the entries had been made in the handwriting of Mr. Harvey, they would amount to no more, at most, than written declarations by him (that the stock belonged to him, and not to Mrs. Harvey), *made at a time when he is not shown*

to have had possession of the certificate of stock. All that we have said above regarding the error in admitting the minutes therefore applies to these entries in Mr. Harvey's books. The fact that Mr. Harvey had possession of this stock cannot be proved by his declarations, either oral or written. As to Mrs. Harvey these declarations were clearly hearsay and *res inter alios acta* and therefore irrelevant.

Jones' Commentaries on Evidence (Blue Book 1913), Vol. 1, Section 140.

So much as to what appears affirmatively on the books. They are not shown to have been correctly kept with contemporaneous entries of all of Mr. Harvey's transactions, and therefore cannot be used to prove a negative; i. e., they afford no basis for the inference that this stock was not given to Mrs. Harvey, merely because of the fact no entry of such gift appears.

> "The absence of entries in books of account cannot, however, be evidence that payments testified to by witnesses were not made. 'A false entry would be an act of wrong; an omission to enter might be mere negligence or forgetfulness, with no motive good or bad.' The relevancy of such testimony, moreover, rests upon the inference arising from the method and regularity of business affairs that the entry, if of a fact, would have been made;"

Jones' Commentaries on Evidence (Blue Book 1913), Vol. 1, Section 137d.

See also:

Schwarze v. *Roessler,* 40 Ill. App., 474.

Where it appears affirmatively that a bookkeeper did not enter up his books for long periods of time—on one occasion not for 18 months—how can it give rise to any inference whatever that he would have entered up this stock as belonging to Mrs. Harvey if in truth such had been the case? We know that Mr. Harvey gave this stock to Mrs. Harvey at least as early as November 26, 1909; plaintiff himself so states in his verified complaint; and yet we also know that no entry indicating that the stock belonged to Mrs. Harvey was made prior to the entry dated March 31, 1910. We also have seen, *supra,* that this entry in all probability was not in fact made until the following December. We know that it would be perfectly absurd to draw an inference from this entry of March 31, 1910, that no gift had been made prior to that time, for we have the admitted fact that the gift was made at least as early as the preceding November. No logical deduction, therefore—and hence no legal inference—can be based upon the mere fact that there was an absence of a proper entry to show this gift to Mrs. Harvey. The books are shown to have been so inaccurately kept that they justify no such inference, and yet the learned Judge used these books for drawing exactly that inference. Since they did not justify such an inference, it was prejudicial error to admit them.

THE WASSERMAN LETTER WAS NOT EVIDENCE AS AGAINST MRS. HARVEY.

This letter will be found at page 103 of the Transcript and the assignment of error on page 63.

On September 5, 1907, Mr. Wasserman, who at the time was Mr. Harvey's bookkeeper, wrote to Mr. Harvey a letter, in which he made certain declarations. Interpreted most strongly in plaintiffs' favor, they amount to this: Mr. Wasserman says to Mr. Harvey, "the stock represented in your Shore Line Investment account is one of your assets." And when Mr. Wasserman saw Mr. Harvey, after sending this letter, Mr. Harvey made no objection to any of the declarations which Wasserman had made in his letter. A clearer case of incompetent evidence—*res inter alios acta*—would be difficult to conceive of.

How could Wasserman's declaration to Mr. Harvey—a declaration never at any time communicated to Mrs. Harvey—possibly prove that Mr. Harvey, and not Mrs. Harvey, was at that time in possession of the stock in controversy?

All that has been said above regarding the inadmissibility of the book entries and the minutes applies with equal, if not greater, force to the admission in evidence of this letter.

Had Mr. Harvey himself written this letter it could have had no proper place in evidence other than for purposes of impeachment. But it was not offered for that purpose nor was any foundation laid for its use

in that connection. The following quotation states the law on the point:

> "We think that the written statements offered in evidence by the defendant were admissible only for the purpose of showing prior contradictory statements made out of court by the witnesses named, and to that extent their statements furnished ground for the contention that those witnesses who had made the statements were so far impeached as to leave their credibility a question for the jury. *These written statements were not, however, any evidence of the fact* . . . Their only effect was upon the testimony of the witnesses who had made them, and they cast a doubt on that evidence simply because the sworn and the unsworn statements disagreed."

Plyer v. *Ins. Co.*, 121 N. Y., at 691.

That the trial Court relied on this letter is clear from the reference to it in the opinion (Trans., pp. 33-36). The error in admitting it was therefore prejudicial.

THE ENTRIES IN THE BOOKS OF THE SAFE DEPOSIT WERE NOT EVIDENCE AGAINST MRS. HARVEY.

For this evidence see pages 129 to 132 and pages 142-3, and for the assignments of error see page 64.

Mrs. Harvey had testified, on a hearing before the commissioner in bankruptcy, on December 5, 1911, that she kept her stock in her safe deposit box; on January 5, 1912, she had corrected this testimony. *Upon the trial she did not testify that she kept her stock in this safe deposit box.* The evidence was certainly not in contradiction of anything that she testified to upon the trial. It, therefore, was not *rebuttal.* It was not offered for purposes of *impeachment.* No foundation

was laid for it for that purpose. (C. C. P., 2052.) It was offered as a part of plaintiff's case in chief. How it would tend to impeach Mrs. Harvey is not clear. But if it had such a tendency, it could have been used for that purpose only after a proper foundation had been laid.

People v. *Devine,* 44 Cal., 457.

Another point: Unless the records of the safe deposit company were shown to have been accurately and correctly kept, they could not on any hypothesis be used against Mrs. Harvey. There is no evidence here that they were accurately kept. On the contrary, the witness Robert Finn testified concerning the entries made prior to the fire of 1906, that the Company now had a better system than it had then:

Q. "The other system was not so correct?
A. "We tried to get them all.
Q. "But you have known of omissions, have you not?
A. "Yes, probably there was" (Trans., pp. 130-131).

He further testified that Mrs. Harvey changed her safe deposit box on May 25, 1905 (Trans., p. 132). And yet there was nothing on the books to show that Mrs. Harvey had visited her safe deposit box at the time she made the change (Trans., p. 175). If records are ever admissible against a third person, who has had nothing whatsoever to do with their compilation, we insist that it must needs be an essential prerequisite that they be shown to have been accurately

kept. Here the evidence was offered to prove a negative—that Mrs. Harvey had not visited her safe deposit box at any time in the fall of 1905. The effort is not to prove what appears affirmatively ~~in~~ on the ~~facts~~ face of these records, but negatively what does not appear therein. Elementary principles demand that before evidence could in any case, for any purpose, be so used, it should be shown that the greatest accuracy attended the keeping of the records.

And moreover, even if accurately kept, these entries were not admissible for the purpose for which the trial Judge has used them:

> "The absence of entries in books of account cannot, however, be evidence that payments testified to by witnesses were not made. 'A false entry would be an act of wrong; an omission to enter might be mere negligence or forgetfulness, with no motive good or bad.' The relevancy of such testimony, moreover, rests upon the inference arising from the method and regularity of business affairs that the entry, if of a fact, would have been made;"

Jones' Commentaries on Evidence (Blue Book 1913), Vol. 1, Section 137d.

> "The book that was offered in evidence . . . was offered for the purpose of proving, by the defendant's omission to give credit for certain days' work, that the plaintiff did not work on those days. It was clearly inadmissible."

Morse v. *Potter,* 70 Mass. (4 Gray), 293.

The above case is quoted with approval in *Kerns* v. *McKean,* 76 Cal., 89.

MRS. HARVEY'S TESTIMONY BEFORE THE REFEREE IN BANKRUPTCY WAS IMPROPERLY ADMITTED.

This evidence appears in the Transcript at pages 132 to 142, inclusive; and the assignment of error will be found on page 65.

This testimony was neither offered nor received in rebuttal, nor for the purpose of impeaching Mrs. Harvey's testimony. It was offered in plaintiff's case in chief. It contained no admission. Obviously, the only purpose for which it could have been used was in impeachment. And before it could be used for that purpose, it was essential that the proper foundation be laid.

C. C. P., Section 2052;
People v. *Devine,* 44 Cal., 457.

CONCLUSION.

This action is in equity. The writ of error which appears in the transcript was sued out merely through an abundance of precaution.

In *Waterloo Mining Co.* v. *Doe,* 82 Fed. Rep., at 51, the Circuit Court of Appeals for this circuit has said:

> "It is further urged by appellees that this court is bound by the findings of facts of the circuit court, unless they are found to be clearly and palpably erroneous. On appeal in an equity suit, the whole case is before the court, and it is bound to decide the same so far as it is in a condition to be decided, on its merits."

And the courts of appeal in other circuits have declared that even in cases where the evidence is conflicting and the Chancellor has made a finding and decree thereon, the appellate court will not hesitate to disturb such findings if some serious mistake has been made in the consideration of the evidence or if an obvious error has intervened in the application of the law.

Thallmann v. *Thomas,* 111 Fed. Rep., at 283.

With the utmost respect for the learned Judge of the trial court, we insist that it would be a judicial wrong to permit the findings in this case to stand.

Respectfully submitted.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Solicitors for Appellant and Plaintiff in Error.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

S. G. HARVEY,
Appellant and Plaintiff in Error,

vs.

B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Appellee and Defendant in Error.

No. 2401

BRIEF FOR APPELLEE AND DEFENDANT IN ERROR.

We are in receipt of the brief for appellant and plaintiff in error.

We agree with counsel that a single issue of fact is involved in this case, and we readily accept counsel's statement of this issue in this language:

DID MR. HARVEY GIVE FIVE HUNDRED AND FORTY-SIX SHARES OF STOCK OF THE SHORE LINE INVESTMENT COMPANY TO MRS. HARVEY IN 1905, WHEN HE WAS SOLVENT? OR DID HE GIVE IT TO HER ON NOVEMBER 26TH, 1909, WHEN HE WAS INSOLVENT?

The learned Judge, Hon. E. S. Farrington, who presided over this cause, in an elaborate opinion, in

which the evidence is carefully examined and reviewed, decided this issue in favor of the appellee, holding that the gift was not made in 1905 but in 1909, when J. Downey Harvey was hopelessly insolvent (Opin., Trans., pp. 27-46).

Hence, in the consideration of this case, we primarily invoke this familiar rule applicable to causes in equity:

THE FINDING OF A CHANCELLOR UPON CONFLICTING EVIDENCE WILL BE DEEMED PRESUMPTIVELY CORRECT BY AN APPELLATE COURT AND WILL NOT BE DISTURBED UNLESS OBVIOUS ERROR HAS OCCURRED IN THE APPLICATION OF THE LAW, OR A SERIOUS MISTAKE HAS BEEN MADE IN THE CONSIDERATION OF THE EVIDENCE.

This rule was considered by the Court of Appeals in the recent case of *United States* v. *Marshal,* 210 Fed. Rep., 597, advance sheets April 2nd, 1914, and the Court of Appeals of the Eighth Circuit said:

> "To secure a reversal upon such a basis as that just mentioned the appellant must convince us not only that the trial court may have been wrong, but that it was manifestly wrong. There must, under the holdings of this court, have been an 'obvious error' of law or a 'serious mistake' in dealing with the facts. *Harrison* v. *Fite,* 148 Fed., 781, 78 C. C. A., 447; *Mastin* v. *Noble,* 157 Fed., 506, 85 C. C. A., 98; *State of Iowa,* v. *Carr,* 191 Fed., 257, 112 C. C. A., 477; *Harper* v. *Taylor,* 193 Fed., 944, 113 C. C. A., 572; *De Laval Co.* v. *Iowa Co.,* 194 Fed., 423, 114 C. C. A., 385. The error must be 'clear and

palpable.' *Babcock* v. *De Mott,* 160 Fed., 882, 88 C. C. A., 64. The conclusion of the trial court is 'presumptively right.' *State of Iowa* v. *Carr, supra.* Some distinction relieving from this rule is claimed in the present case because the testimony was not taken before the judge but before an examiner, and it is said that under such circumstances this court is in as favorable a situation to deal with the matter as was the court below. *United States* v. *Booth Kelly Lumber Co.,* 203 Fed., 423, 121 C. C. A., 533, from the Ninth Circuit, is cited to this point. But the question is not so much one of situation to decide as of where the law places the primary determination of questions of fact. While no doubt the circumstance that the district judge personally heard the witnesses tends to strengthen the presumption in favor of his conclusion—a consideration mentioned by this court in *Coder* v. *McPherson,* 152 Fed., 951, 953, 82 C. C. A., 99; also in *Harper* v. *Taylor,* 193 Fed., 944, 113 C. C. A., 572, by the Circuit Court of Appeals for the Sixth Circuit, in *Mt. Vernon Co.* v. *Wolf Co.,* 188 Fed., 164, 110 C. C. A., 200, and by the Circuit Court of Appeals for the Ninth Circuit in *The Santa Rita,* 196 Fed., 890, 100 C. C. A., 360, 30 L. R. A. (N. S.)."

And this same rule was considered in the earlier case of *Harper* v. *Taylor,* in 193 Fed., 946 (C. C. A.), decided in 1911, in which the Court said:

"While the findings of fact of a chancellor are not conclusive upon an appeal in equity, they are presumptively correct and persuasive, and unless an obvious error has occurred in the application of the law, or a serious mistake has been made in the consideration of the evidence, such findings will not be disturbed. This is the settled doctrine of

this court. *Thallman* v. *Thomas,* 111 Fed., 277, 49 C. C. A., 137; *Harrison* v. *Fite,* 148 Fed., 781, 78 C. C. A., 447; *Babcock* v. *De Mott,* 160 Fed., 882, 88 C. C. A., 64. And this rule is especially applicable when the evidence was taken orally in the court and the chancellor had an opportunity to see the witnesses, observe their demeanor while testifying, judge of their candor and intelligence, and thus was able to determine more accurately their credibility and the weight to be given their testimony than an appellate court which must determine the facts from a printed record."

See also *State of Iowa* v. *Carr,* 191 Fed., 257, C. C. A., at page 263.

Harrison v. *Fite,* 148 Fed., 782, C. C. A.;
De Laval Separator Co. v. *Iowa Dairy Separator Co.,* 194 Fed., 423, at 425, C. C. A.

This case was not tried on depositions, nor before a referee, but on testimony of witnesses given in open court, and on documentary evidence, and an examination of the record cannot lead to any other conclusion than that reached by the learned trial Judge in his opinion. A mere casual inspection of the record will show not only that the lower Court was right, but that the evidence adduced at the trial largely preponderated in favor of the appellee.

SUMMARY OF FACTS.

The pleadings and evidence in this case indisputably disclose the following state of facts:

FIRST: On June 26, 1905, J. Downey Harvey acquired, by purchase with his own money, three hundred shares of the capital stock of the Shore Line Investment Company. On August 22, 1905, he acquired with his own money sixty-six shares of the stock of the Shore Line Investment Company, on September 22, 1905, he made an additional purchase of one hundred eighty shares of stock in the same company.

SECOND: J. Downey Harvey and the defendant, Mrs. S. G. Harvey, claim that in May, 1905, about a month prior to the purchase by him of the shares of stock in question, he told his wife, the defendant, that he was "going to give her the stock," that he would "acquire in the land company." And he claims that thereafter, to-wit, on June 26, 1905, he entered into the following transaction with her with respect to the certificates:

> "A. I took them and handed them to her and told her they were the certificates as they came from the Shore Line Investment Company, that she was interested in, that I promised her, and I told her to keep them and *take care of them,* that they were of value, that they were endorsed; and *I said, the reason they are remaining in my name* is I am largely interested in the Ocean Shore

> Railroad, and these two companies are associated in the development of one another, *one depends upon* the success of the other—now, I said, if I KEEP THIS STOCK IN MY NAME, which I WILL WANT TO DO, I WANT TO SHOW THE PEOPLE that the Ocean Shore Railroad is *interested* in the success of this land company, and that I am a *LARGE HOLDER* in it and *THAT AT ALL TIMES* I WILL BE READY TO HELP OUT GRANADA AS MUCH AS WE POSSIBLY CAN" (Trans., p. 149).

THIRD: Mrs. Harvey gives a somewhat similar account of the alleged transaction of 1905.

FOURTH: It is claimed that under this arrangement the various shares of stock were handed over to Mrs. Harvey by J. Downey Harvey at the very times of their acquirement by him in 1905, the agreement being, however, that J. Downey Harvey should withhold the shares of stock from registration, should deal with the stock as his own, and should generally, by other acts and contrivances, secrete from the public the fact of his alleged gift. In other words, it was agreed between them that he should be allowed to "show the people" that he was a "large holder" in the company and that he was at all times "ready to help out Granada" as much as he "possibly could," and that the public should be kept in ignorance of the transfer and that that fact should be carefully concealed from the public for an indefinite period and that he should continue to pose to the world as the true and actual owner of the shares of stock in ques-

tion. In other words, the parties deliberately agreed that the pretended gift should be a secret one and that the world should be deliberately kept in ignorance of the transaction, and he should have sole control and dominion of the stock and the substantial possession thereof should remain unchanged.

FIFTH: Following out this agreement to deceive the public, Harvey continued to remain the owner of the shares of stock in question. He retained the apparent title, he retained the actual control and dominion, and the enjoyment of every right and privilege it commanded up to November, 1909.

SIXTH: Harvey was the active president of the corporation and the books of the company, up to November 26, 1909, at his direction, represent him as the owner and holder of all of the shares in question, free and clear of any encumbrance or claim on the part of his wife, and at various stockholders' meetings he declared in writing that he was the owner and holder of the shares of stock in question and he has admitted that he exercised control and dominion over the stock without let or interference or even suggestion from his wife.

SEVENTH: J. Downey Harvey kept an elaborate set of private books, in which were recorded his transactions with his wife. These books are in evidence and they conclusively show his ownership of the shares of stock in question as his property up to

November 26, 1909. Up to that date no mention is made in these books of the alleged secret transaction between himself and his wife in June, 1905.

Ledger: His private ledger conclusively shows his ownership of the shares as his sole property up to November 26, 1909. It contains an account of "Family Gifts and Allowances." Under this caption are recorded a number of gifts made by Harvey to his wife long prior to 1909, but no record is made prior to that date of a gift of the shares of stock involved in this controversy. It does appear, however, that his bookkeeper, Crosby, at a time when insolvency was apparent, viz., between 1909 and 1910, and receivership proceedings had been commenced against the Ocean Shore Railway Company, received oral instructions from Harvey, and wrote in the ledger, referring to Shore Line Investment Company stock, "This is the property of Mrs. H. and belongs to her" (Trans., pp. 113, 115, 122, 123 and 124).

Journal: The journal contains no entry in regard to this stock until after November 26, 1909, when for the first time it contains an entry transferring the stock from Harvey to his wife and showing no prior transaction in connection therewith (Trans., pp. 114, 119, 124).

Book of Trial Balances: His book of trial balances shows conclusively that he owned this stock in February, 1906, in November, 1906, in December, 1906,

in January, 1907, in February, 1908, and in March, 1908, and in October, 1909 (Trans., p. 125).

Cash Book: Mr. Edwin A. Wasserman was bookkeeper from 1895 to 1908, and made all the entries in the cash book up to 1908. This cash book was altered by some one after Mr. Wasserman had ceased to keep the books, for it appears that in an item under date of September 23, 1905, "Shore Line Investment Company," there appeared in pencil the words: "Property of S. G. Harvey," and Mr. Wasserman testified that these words were in the handwriting of Mr. Harvey, and that he had no idea when that particular entry was made, and he had never before seen it (Trans., p. 118).

It will be borne in mind, as hereinafter particularly pointed out, that the book entries were all made pursuant to declarations of Harvey to his various bookkeepers.

EIGHTH: On September 22, 1907, Harvey called upon his bookkeeper, Edwin A. Wasserman, admittedly an exceptionally competent bookkeeper, for a statement truly reflecting to him the condition of his financial affairs. There was furnished him a statement (Trans., pp. 103-109). It specifically mentions that Harvey had presented his wife with "one-half of Santa Cruz Beach Company's stock and one-half of Bull Frog Banner stock." It specifically shows that

all of the Shore Line Investment Company's stock is the property of Harvey.

The correctness of this statement has not been questioned or its integrity impeached, and it must be admitted that it truly reflects the condition of Harvey's affairs on September 22, 1907. It shows Harvey's ownership of the stock on that date. Wasserman testifies that this statement was discussed with him by Harvey, and Harvey had "no suggestions to make" in regard thereto (Trans., p. 109).

Harvey's assets, as well as his liabilities, were considered by the witness and Harvey, and Mr. Wasserman advised Mr. Harvey that in view of his condition something should be done to reduce his liabilities. Hence it clearly appears that this written statement rendered to Mr. Harvey at his request by his bookkeeper on September 22, 1907, was examined by him, and that he knew that the Shore Line Investment Company stock was included in his list of assets. This portion of the statement will be particularly noted:

> "I would advise a careful study of both with a view of disposing of all of your assets which you possibly can at a valuation a little in advance of the above, if possible, and paying off the debts as fast as possible" (Trans., p. 108).

NINTH: On April 13, 1907, an assessment of $10 a share, amounting to $5460, was levied on this stock and the amount thereof was paid by J. Downey Harvey and charged to him on his own books and not to

Mrs. Harvey, although his same books show strict dealing and accounting in all business transactions with his wife.

For instance: The sum of $500 was advanced by him to his wife on February 21, 1907, less than two months prior to the Shore Line Investment Company assessment, to pay an assessment on her stock in the Ocean Shore Railroad Company. This was carefully charged to his wife on the books. On January 11th, 1907, he gave Mrs. Harvey $200 in cash. This was also charged to her. On January 28th, 1907, he gave her $300 in cash. This was also charged to her. Etc. (Trans., p. 101). And the books show that entries were carefully made of transactions between Mr. and Mrs. Harvey (Trans., pp. 101, 102, 114).

TENTH: At or about the time when Harvey was admittedly insolvent, owing debts of two hundred thousand dollars and upwards, according to the admitted facts in the pleadings, the Shore Line Investment Company negotiated through Charles W. Fay, in the employ of the Shore Line Investment Company, a loan on the holdings of the company. It became necessary for Fay to have possession of these certificates, the lender requiring a deposit of all the certificates of stock. Harvey gave these certificates to Fay either in October or the first part of November, 1909. He gave the certificates to Fay, endorsed with his name in blank, the lender necessarily requiring such endorsement. The name of Mrs. S. G. Harvey no-

where appears on these certificates. Mrs. Harvey had nothing to do with the transaction and did not meet Fay in connection therewith. Fay received the certificates from Harvey, and not from Mrs. Harvey (Trans., p. 165).

ELEVENTH: In December, 1906, Harvey transferred to one J. A. Folger sixty-six shares of this same stock and Mr. Folger returned the stock to him in December, 1907. The new certificate is in the name of J. Downey Harvey and not in the name of his wife, the alleged owner. The certificate bears his name as president of the company as well as the owner and holder thereof. No explanation is offered for this transaction. Mr. Folger did not see Mrs. Harvey in connection therewith. He was not called as a witness (Trans., pp. 96, 151, 152). The witness Corbet testified that on November 26, 1909, for the first time Mrs. Harvey's name is mentioned in connection with any of the certificates.

> "The certificate issued in the name of Sophie G. Harvey was receipted for on November 26, 1909, the signature being 'Sophie G. Harvey,' 'by J. Downey Harvey'" (Trans., p. 96).

TWELFTH: Harvey held the proxies of a great many owners and holders of stock in the Shore Line Investment Company. He held neither power of attorney nor proxy for Mrs. S. G. Harvey (Trans., p. 90). He voted these shares as his individual

property at all corporate meetings up to 1909, and in writing at such meetings declared that he was the owner thereof (Trans., pp. 89, 95).

THIRTEENTH: On November 26, 1909, Harvey became a hopeless bankrupt and was unable to pay his debts and Mrs. Harvey knew that on that date he was insolvent, and she had "knowledge of his financial condition," and she knew "that for a long time prior to that date" he was unable to pay his "debts from his own means as they became due, and that the aggregate of his assets, taken at a fair valuation, were insufficient in amount to pay his just debts and liabilities" (Complaint, Trans., p. 8). (Undenied by the answer.) He was so insolvent on that date that his total assets for the benefit of his creditors would not net two (2) per cent. to the creditors holding just and valid debts (Complaint, Trans., p. 8). (Undenied by answer.) In other words, his total assets were about $4000 as against debts aggregating $200,000 and upwards.

FOURTEENTH: It was not until after Harvey's insolvency that she publicly claimed that these shares belonged to her and that Harvey had given them to her in 1905. On this date, when she admits knowledge of Harvey's insolvency, her alleged ownership was recorded for the first time on the books of the company. Her claims, if any she had, had been actively and purposely concealed by herself and husband in

accordance with the alleged secret agreement of June, 1905, according to the testimony of Mr. and Mrs. Harvey.

FIFTEENTH: (a) Mrs. Harvey up to November 26, 1909, never showed the certificates of stock to a single living human being. (b) The certificates at no time bore her name. (c) She never interfered with Harvey's control and dominion of the shares of stock. (d) She paid no consideration for the stock. (e) She admits that she knew Harvey was insolvent in 1909, when the shares for the first time were transferred to her upon the books of the corporation. She did not assert her alleged ownership prior to 1909.

SIXTEENTH: Her other alleged gifts, and they were valuable, she held openly in her own name from the time they were made, and she held them as gifts are ordinarily held. As shown, Mr. Harvey's ledger contained an account known as "Family Gifts and Allowances." We find no entry of the alleged gift of this valuable holding in this account prior to 1909 (Trans., pp. 102, 107, 108).

SEVENTEENTH: She claimed to have received the first certificate on June 26th, 1905, on Webster Street IN SAN FRANCISCO on the very date of its acquirement by Harvey. She testified positively that she remembered the dates when the certificates were given her, because she "put them down on a memorandum" (Trans., p. 134).

EXHIBIT NO. 9.

300 shares delivered June 26th, 1905;
On August 22, 1905, received 26 shares;
On September 22, 1905, received 180 shares.

It appears from her cross-examination that on June 26th, 1905, Mrs. Harvey was not in San Francisco, but in New York City, and hence could not have received the certificate from Harvey as testified to by her. This fact was also developed on the cross-examination of her daughter, Mrs. Barron (Trans., pp. 173-174).

It will be borne in mind that Harvey testified that he had given her these certificates as he received them from the company. In another part of Mrs. Harvey's testimony she endeavors to make it appear that the memorandum contains the dates of the certificates and not the dates of deliveries of the certificates to her. This needs no comment. The memorandum specifically refers to deliveries to and receipts by her, and why should she have made a memorandum of the dates of the certificates if she had the certificates themselves in her possession as she claims? (Trans., p. 166.)

EIGHTEENTH: Mrs. Harvey made unqualified statements concerning her alleged ownership of the stock, which in fact are untrue. Her statements may not be attributed to mere mistake. She has changed her testimony to meet the varying fortunes of her case

and her self-contradictions cannot be reconciled, by any impartial tribunal.

(a) On December 5, 1911, she appeared as a witness at the first meeting of creditors and she testified that on JUNE 26, 1905, Harvey handed her a certificate for 300 shares of stock and that she put the certificate in HER SAFE DEPOSIT BOX. On AUGUST 22, 1905, she testified he gave her 66 shares and she PUT THEM IN HER SAFE DEPOSIT BOX, and on SEPTEMBER 22, 1905, he gave her 180 shares and she PUT THEM IN HER SAFE DEPOSIT BOX. When asked how she remembered the dates at which these certificates were given to her she said, "Because I put them down on a memorandum" (Trans., pp. 133-134). Hence the witness made unqualified statements replete with detail that she received the shares of stock at the times mentioned and immediately upon their receipt placed them in a safe deposit box.

(b) On the 6th day of December, 1911, J. K. Moffitt, chief official of the safe deposit vaults of the First National Bank, was called before the Referee as a witness for the trustee, and questioned by Mr. Williams, counsel for the trustee, in regard to the record of Mrs. Harvey's business with the safe deposit vaults. The Referee on said occasion had indicated that the trustee was entitled to have the records exhibited in so far as they had a bearing upon the visits which Mrs. Harvey claimed to have made to the vaults in

order to deposit these certificates and that such could be his ruling. Strenuous objections were made by O. K. Cushing, representing the deposit company, to an examination of these records. On the 19th day of December the matter was again brought up before the Referee. Mrs. Harvey was not present at this hearing. Mr. Moffitt again appeared on this date and again the company objected to producing the records. Mr. Harvey was in the Referee's room since the commencement of the proceedings, according to the best recollection of Mr. Williams, and his testimony is neither denied nor disputed,

"He interrupted the proceeding while Mr. Moffitt was on the stand and handed me this letter" (Trans., pp. 144, 145).

"San Francisco, December 19, 1911.

"E. H. Williams, Esq.,
"San Francisco, California.

"Dear Sir:—

"If you wish to learn from the safe deposit company the dates on which I visited my safe deposit box, I have no objection whatever, and am perfectly willing that the bank officials shall give you the information, and you may tell them so for me. I do not myself know the exact dates of my visits. I have, of course, been there a number of times since 1905; but I have at all times had a safe of my own wherever I have been living, whether here or at Monterey, and I kept many of my papers in these safes, and, as I think it over, I am positive I kept my certificates of stock there in-

stead of in my safe deposit box. I also forgot for the moment and omitted to tell you when on the witness-stand, of the sale by Mr. Harvey to me of 200 shares of Philippine Telephone & Telegraph stock in March, 1910. This stock was worth about $20 per share, and the transfer to me was a part of the same transaction whereby I purchased the Visitacion Valley lots, the Beach Company's stock and other property enumerated by me in my testimony, but this Philippine stock had slipped my mind and I forgot to mention it. Should you, or Commissioner Kreft, wish me to correct my testimony in these particulars, I will, of course, do so gladly.

"S. G. HARVEY."

It was very evident that the ruling of the Referee made on December the 6th, 1911, was to become final, and that the records would have to be produced. It was then, and only then, that Mr. Harvey produced this letter from his pocket. The letter was written and delivered under these circumstances. It was written on December the 19th, 1911, and not on December the 5th. It was written when it was quite apparent that the trustee would have immediate access to the records. Concerning this letter, Mrs. Harvey, on her direct examination in her own behalf, testified as follows:

"With regard to the letter that was offered in evidence, expressing my allowance to have them secure the information from the safe deposit; that letter was drawn for me by my own counsel, Mr. Wheeler. This occurred on the same day when I transcribed it. I gave it to my husband to be de-

livered to the court. I told him to deliver it immediately, and to hurry. When I was first on the witness-stand I testified that these certificates were in my box in the safe deposit. I had had no counsel or advice before attending that hearing" (Trans., p. 168).

Mrs. Harvey's memory was refreshed after the Referee had announced that the trustee was entitled to have the records exhibited (Trans., p. 144).

Incidentally, it might be mentioned that the First National Bank was a secured creditor of J. Downey Harvey, to the amount of $245,000, as shown by statement (Trans., p. 104). And incidentally it might be mentioned that Harvey was the owner of 946 shares of the First National Bank stock, valued at $198,660 (Trans., p. 105). If the Referee had ruled against the application, or had indicated that his ruling would be against the application, would this letter have been produced? It was not produced until the final moment.

Here we find the witness testifying on December the 5th that she had placed these certificates in the safe deposit box on various dates, and kept them there, and two weeks later testifying by letter that she is very positive that she had *held them at all times* in a portable safe belonging to her, to which she alone had access, and which was kept in her own home.

(c) On January the 5th, 1912, Mrs. Harvey testified and changed her testimony. This time she is equally positive that she did not have any shares of

stock of the Shore Line Investment Company in her safe deposit box during the year 1905, and she is equally positive that she never had any shares of stock of the Shore Line Investment Company in her safe deposit box at any time; and she is equally positive that the certificates which she had testified to having placed and kept in a safe deposit box, during all these years, were kept in a portable safe in her own home (Trans., p. 137). She goes into as many minute details with respect to the placing of the shares of stock in her portable safe as she did when she testified she had placed them in her safe deposit box (Trans., pp. 137-138, 141).

(d) During all these years that the shares of stock were supposed to have been resting in a portable safe "no higher" than her "lap" in her own home she had a safe deposit box to which she made frequent visits during the years 1906-7-8-9-10. She did not visit this box during 1905. She did visit her safe deposit box a great many times during the succeeding years, although she claimed to have had nothing in the box of any value aside from an antique match box, her husband's will and some personal letters. She does not explain the frequency of her visits during these years to the safe deposit box (Trans., pp. 138, 143).

NINETEENTH: The records produced by Thomas Finn, custodian of the Safe Deposit vaults, conclusively show that Mrs. Harvey did not visit her safe

deposit box from June to December, 1905. And hence she could not have placed the certificates therein as she had originally testified:

TWENTIETH: There are no means of determining upon which occasion Mrs. Harvey swore truly or falsely, mistakenly or accurately, and therefore under the authorities it becomes the duty of the Court to regard her testimony as utterly unworthy of credit and dismiss it without further consideration, and this aside from its inherent improbabilities.

TWENTY-FIRST: Mrs. Harvey's counsel seeks to explain away the effect of her inconsistent statement in this way:

> "MR. WHEELER—I am about to conclude with the witness. Q. I will ask you the question generally, Mrs. Harvey. Have you a clear and accurate memory as to dates and *transactions* which happened five or six years ago?
> "A. I am afraid I have not, Mr. Wheeler" (Trans., p. 173).

In order to prove that the transfer was made in 1905, of the certificates in question, Mrs. Harvey necessarily relies upon the testimony of her husband, his declarations upon the subject. She is compelled to stand or fall by his declarations, her own counsel has conceded that her own testimony as to transactions occurring five years ago is inaccurate and under the authorities no reliance may be placed thereon. Not a scintilla of reliable evidence of her alleged ownership

of the certificates in 1905 has been introduced. If Harvey's declarations are admissible as evidence in her favor, they are surely admissible against her and his solemn and positive declarations as to her non-ownership in 1905 far exceed in number his alleged fragmentary declarations as to her ownership in that year. His declarations as to his ownership up to 1909 and her consequent non-ownership in 1905, or earlier than 1909, consist of statements made to his book-keepers in due course of business, memoranda furnished for his private books, consistent and continuous entries in his private books up to November 26, 1909, his voting the shares of stock, his declarations in writing that he was the owner and holder made at corporate meetings, his transfers of a part of the stock in question to one J. A. Folger, his delivery of all of the certificates to Charles W. Fay for the purpose of obtaining a loan and his general conduct showing possession, control and dominion thereover, without interference or suggestion upon the part of his wife.

Hence we submit that the evidence on the question of delivery, clearly preponderates in favor of the plaintiff. The items of evidence with respect to these matters are pointed out in detail in a subsequent part of this brief.

Counsel states that the witnesses whose testimony is relied upon to establish the fact that the gift was made in 1905, are not "only the two principals in the trans-" action, Mr. and Mrs. Harvey, but also Mr. Fay, now

" postmaster at San Francisco. Mr. Burke Corbet, a " reputable practitioner at this bar; Mr. Wasserman and " Mr. Crosby, who were Mr. Harvey's bookkeepers, " and Mrs. Barron, daughter of Mr. and Mrs. Har- " vey." Counsel surely does not rely upon the testimony of Mrs. Harvey, for he has admitted that she has no accurate memory as to the transaction in question. Under the authorities no reliability can be placed upon her testimony, conceded by her own counsel to be of an unsatisfactory character. She has contradicted herself innumerable times on most material points involved in this case. Mr. Harvey's testimony, as will be pointed out, is absolutely in favor of the plaintiff. Mr. Fay throws very little light upon the transaction. Mr. Corbet was called as a witness for the plaintiff, as were Mr. Wasserman and Mr. Crosby. In fact, the plaintiff, to establish his case, was necessarily compelled to call upon the intimate friends and business associates of J. Downey Harvey. Mr. Corbett had acted as his counsel; Mr. Crosby and Mr. Wasserman were his private bookkeepers; Mr. Crosby was in his employ at the time of giving his testimony.

THE EVIDENCE CLEARLY SHOWED AND THE COURT FOUND THAT THE GIFT WAS NOT MADE UNTIL 1909. BUT IN ANY EVENT DEFENDANT'S CLAIM IS SUBJECT TO THE FOLLOWING RULES.

By virtue of the alleged agreement made between Harvey and his wife in June, 1905, he was to have the absolute control and dominion for all time over the shares of stock in question, and there was to be no change of possession, and the corporate books, his own private books, his own statement of his assets, his transactions with Folger and his transactions with Fay, and his declarations, oral and written, conclusively show that the dominion and control of this stock always rested in him, without suggestion or interference upon the part of his wife. He never relinquished his control and dominion even for a single moment. His wife at no time interfered with its control or dominion or gave him directions with respect thereto. Harvey never intended to divest himself of the control and dominion over this stock.

Section 3440 of the Civil Code of this State provides:

> "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an *actual and continued change of possession* of

the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors . . ."

This section has been construed in a large number of cases. It came before the Supreme Court of this State in *Stevens* v. *Irwin,* 15 Cal., 503, and this authority has been uniformly upheld by the Supreme Court of California ever since. The Court said:

"The delivery must be made of the property; the vendee must take actual possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous—not taken to be surrendered back again—not formal, but substantial."

In *Murphy* v. *Mulgrew,* 102 Cal., 547, it is said:

"From the evidence of the plaintiff it will be perceived that no actual change of possession of this property took place at the time of the delivery of the bill of sale; but, on the contrary, in all its surroundings it remained entirely in *statu quo.* Mrs. Murphy attempts to escape the legal effect of the foregoing evidence by the claim that she had appointed her husband her agent to take the possession and control of the horses for her, and, as such agent, his possession was her possession, but there is nothing to be urged in favor of such a contention. Both the letter and the spirit of the

law contained in section 3440 would be defeated by the recognition of such a principle. The object of the statute is to require *notice to the world* of the *transfer of personal property,* in order that men may be able to deal with each other upon equal terms, and from a common level. The efficacy of the statute would be entirely destroyed if the vendor were allowed to remain in possession of the property as the agent of the vendee, in the absence of *any notice to the world of such a change of conditions. A practice of that kind would be in direct conflict with the terms of the statute itself.*

"We do not find a syllable of evidence in the record that would indicate to the outside world that a change of ownership had taken place as to these horses, and we could hardly imagine a case where the provisions of the statutes could have been more entirely disregarded. . . . The fact that a *vendor and vendee are husband and wife,* or parent and child, is no reason why the provisions of the statute should receive a different or more liberal construction. These conditions give the statute no additional elasticity. The rule of construction is the same in all cases, and the relationship existing between the parties is a matter wholly immaterial."

In the case at bar we have a deliberate agreement to violate the very terms, object and policy of the law.

In the case of *Sequeira* v. *Collins,* 153 Cal., 432, the Court said:

"It was intended that the vendee should immediately take and continuously hold the possession of the goods purchased, in the manner and accompanied with such plain and unmistakable acts of possession, *control* and ownership, as a prudent

bona fide purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property."

See also, *Rothschild* v. *Swope,* 116 Cal., 678.

And in *Bunting* v. *Saltz,* 84 Cal., 168, it is said:

"It must be open and unequivocal, carrying with it the usual marks and indications of ownership. . . . A transfer of personal property, not accompanied by an immediate delivery, and an actual and continued change of possession, is conclusively presumed to be fraudulent, and therefore void as against the creditors of the vendor. The word 'actual' as applied to the change of possession required by section 3440 of the Civil Code, means existing in act, and truly and absolutely so; REALLY ACTED OR ACTING; carried out; OPPOSED TO POTENTIAL, POSSIBLE, VIRTUAL, OR THEORETICAL."

"'Actual and continued change of possession,' as used in reference to the sale of personal property by a judgment debtor, means 'an open and public change of possession, which is to continue and to be *manifested continually by outward and visible signs,* such as to render it evident that the *possession of the judgment debtor* has ceased."

Topping v. *Lynch,* 25 N. Y. Sup. Ct. (2 Rob.), 484, 488;

Bell v. *McClellan,* 67 Cal., 285;

Gahoon v. *Marshall,* 25 Cal., 201.

Morris v. *McLaughlin,* 64 Pac., 221.

Dexter v. *Parkins,* 22 Ill., 144, at page 146, the Court uses this significant language:

"In this case, the evidence does not show any delivery of the property to the claimant after the execution of the bill of sale. It is absolute on its face, yet the property remained as much in the possession of Smallridge as it did in that of the claimant, after as before its execution. Such circumstances are not evidence of fraud, but are fraud absolutely."

Woods v. *Bugbey,* 29 Cal., 466;
Walters v. *Ratcliff,* 61 Pac., 1072.

In *McKee Stair Building Co.* v. *Martin,* 126 Cal., 558, the Court said:

"A person familiar with the business and the use of the premises and personal property thereon, prior to the sale, on visiting it subsequently could have seen nothing evidencing a change of ownership *or a change of possession; even the change in the sign,* unexplained, *would have been meaningless to him.*

"It has been held a great many times in this State that to make a sale of personal property good as against the creditors of the vendor, and to avoid the presumption of fraud denounced in section 3440 of the Civil Code, there must be a visible and apparent change of the custody of the property such as to give evidence to the world of the claims of the new owner. We cite one case: *Hesthal* v. *Myles,* 53 Cal., 623."

In *George* v. *Pierce,* 123 Cal., 172, the Court said:

> "We have examined the record with extreme care, and have failed to find evidence supporting a finding of fact to the effect that there was an actual and continued change of possession from DeLong to George. To sustain the validity of a pledge, as against creditors of the pledgor, there must be an *open* and *visible change* of custody of the property. *Secret liens of all kinds are abhorrent to the law, and for these reasons are not supported . . .*"

In connection with the above case the Court will bear in mind the fact that the parties to this transaction, according to their own testimony, agreed to deceive the world for their individual benefit and by maintaining at all times secrecy with respect to the alleged transfer and deliberately clothed the alleged donor with the apparent ownership of the property.

REGISTRATION ON THE BOOKS OF THE CORPORATION IS NOT ESSENTIAL. THE FAILURE TO REGISTER THE TRANSFER, HOWEVER, MAY BE CONSIDERED BY THE COURT IN DETERMINING THE QUESTION OF FRAUD.

It has been repeatedly held in California and other States that transfers of stock in corporations are valid as between the parties without registration upon the books of the corporation. We do not question the correctness of this rule. It was reaffirmed in the case of *National Bank* v. *Western Pacific,* 157 Cal., 573. The principle enunciated in this case, however, has no application to the case at bar. The *bona fide* char-

acter of the transfer was not questioned, value was paid for the shares of stock in an amount exceeding fifty thousand dollars, the interest of the vendee was disclosed, there was no agreement to violate any statute, no question of change of possession or dominion and control were involved, and the Court expressly limits the decision to this:

> "The general rule is that a creditor who attaches property for his debt obtains a lien only upon the title or interest which the debtor has in the property at the time of the levy, and that if, at that time, all title and interest therein has passed from the debtor to a third person, the attaching creditor gets nothing by the levy. (*Tuohy* v. *Wingfield,* 52 Cal., 319; *Howell* v. *Foster,* 65 Cal., 173 (3 Pac., 647); *Ward* v. *Waterman,* 85 Cal., 508, 34 Pac., 930. Where a statute declares a previous transfer of title void as to creditors of the transferrer, there is an exception to this rule. The exception is of course founded upon the theory that as the law makes the transfer void as to the creditor, there is, as to him, no transfer at all, and the title to the property, for his benefit, remains in the debtor, notwithstanding a previous legal transfer good as against all other parties. *Examples of this are found in the case of transfers tainted with actual fraud, and transfers of personal property in good faith not followed by immediate delivery and actual and continued change of possession.* The latter are conclusively presumed to be fraudulent. All such transfers are expressly declared to be void as to the creditors of the person making the transfer. (Civ. Code, Secs. 3439, 3440.)"

SHARES OF STOCK ARE PERSONAL PROPERTY AND SUBJECT TO SECTION 3440 OF THE CIVIL CODE.

In *Tregar* v. *Etiwanda Water Co.*, 76 Cal., 537, the Court said:

> "Shares of stock in a corporation are certainly personal property and section 3440 of the Civil Code applies to transfers of shares of stock."

Hence a transfer of shares of stock must be followed by actual and continued change of possession, and the authorities applicable to transfers of personal property apply with equal force to transfers of stock. This law has never been overruled, and remains a law of California to this day.

And in the case of *First National Bank* v. *Holland*, 39 S. E., 128, cited by counsel, the controversy was between creditors of a decedent and his widow and involved title to shares of stock in a bank. After the alleged gift THE DECEDENT EXERCISED NO CONTROL OVER IT. The question involved was whether a certificate of stock comes within the definition of section 2414 of the Virginia Code, which provides that:

> "No gift of any GOODS OR CHATTELS shall be valid unless by deed or will OR UNLESS ACTUAL POSSESSION shall have come to and remain with the donee, or some person claiming under him. If the donor and donee resided together at the time of the gift possession at the place of their residence shall not be a sufficient possession within the meaning of this section."

The Court said:

> "The answer to this question depends upon whether the words 'goods or chattels' in the section . . . Sections 2414, 2461, 2462, 2465 and 2569 all relate to gifts, loans, sales or partition of the same kind of property described with the same terms, namely, 'goods or chattels' or goods and chattels. This Court has decided that the words 'goods and chattels' in Section 2465 mean visible, tangible personal property only, that they do not includes choses in action . . . If it was intended by their use in Section 2414, or any other section, to comprehend all property not real, incorporeal as well as corporeal property, IT IS STRANGE THAT THE LEGISLATURE DID NOT MAKE ITS MEANING PLAIN BY THE USE OF THE TERMS 'PERSONAL ESTATE.' These terms are defined by the Code, and, as defined, include every possible property interest except real estate. Throughout the Code the terms 'personal estate' are employed whenever personal property in its most extensive sense is intended."

Section 3440 of the Civil Code of California unlike the Virginia Code sections uses the terms "personal property"—"every transfer of personal property other than a thing in action . . ." It is conceded that shares of stock are personal property and are not choses in action and are subject to section 3440. *National Bank* v. *Western Pacific,* and *Tregear* v. *Etiwanda Water Co., supra,* also section 953, Civil Code of California.

HARVEY'S DECLARATIONS, ORAL AND WRITTEN, UP TO 1909 AND WHILE IN CONTROL OF THE SHARES OF STOCK CONCLUSIVELY SHOW NO TRANSFER TO HIS WIFE EARLIER THAN 1909.

We have heretofore pointed out the various written declarations of J. Downey Harvey as to his ownership of the stock in question up to October, 1909. His specific declarations with respect to his ownership are mentioned in detail in a subsequent part of this brief, and his repeated declarations in this respect are absolutely corroborated by the solemn declarations in writing of his two admittedly competent bookkeepers, their declarations being made in due course of business with a view of protecting the interest of their employer, and being made authorizedly by Harvey.

> "Thus, the declaration of a debtor, while in possession of personal property after a sale or transfer by him, which show fraud in the transfer are admissible against the vendee, and in favor of creditors."
>
> *Jones on Evidence,* 2nd ed., section 351, p. 440.

In *Purkitt* v. *Polack,* 17 Cal., 332, the Court said:

> "The *control* of the property after the alleged sale, the indebtedness of the grantor at the time, the absence of the grantee from the state, and the failure on the part of the latter to show any payment of consideration, were amply sufficient to raise a *prima facie* intendment of fraud in the transaction."

In *Murphy* v. *Mulgrew, supra,* the Court said:

> "The Court committed error in NOT ALLOWING declarations of the vendor Murphy as to the character of his possession after the sale and while he was in the actual possession of the property."

That these declarations are admissible is shown by the recent case of *Bush* v. *Helbing,* 134 Cal., 676, in which the Court said:

> "The plaintiff offered to prove that after the transfer and before the deed was recorded, the defendant Louis had supervision and charge of the property as his own; that he had the buildings thereon insured in his own name; that a loss occurred by fire, and he made the proof in his own name, in which he stated that he was the sole owner, and collected the insurance, giving the receipt in his own name; that he showed plaintiff the property, and told plaintiff that the buildings were insured in the name of her husband, and that he collected the insurance, and appropriated it to his own use, that she never told any one about the deed except one man, and that just the day before it was recorded. The Court sustained defendants' objection to all such testimony, and plaintiff excepted. In this the Court was in error. The evidence was offered for the purpose of showing that the vendor, after making the deed, still retained possession of the property, and his acts and declarations as to the character of his possession after the sale, while he remained in the possession thereof. Such evidence, in cases of actual fraud, is generally admissible, and particularly here, where the defendant Louis was the owner of the record title thereto, purchasing the materials for improving it and the making of the deed was kept secret, the

knowledge thereof resting solely in the breast of husband and wife."

"It is said in *Waite on Fraudulent Conveyances,* 3rd ed., section 279:

"'As proof of the continued possession of the vendor is competent evidence to impeach the supposed transfer, it would seem to follow that any acts or declarations of the possessor while so retaining the property must also be competent as characterizing his possession. So long as the debtor remains in possession of the property which once belonged to him, and which his creditor is seeking to condemn as fraudulently conveyed, the *res gestae* of the fraud, if any, may be considered as in progress, and his declarations, though made after he had parted with the formal paper title, may be given in evidence for the creditor against the claimant, by reason of the continuous possession which accompanied them.'

"The rule as stated in the text is supported by numerous decisions. *Murphy* v. *Mulgrew,* 102 Cal., 552; *Jones* v. *Simpson,* 116 U. S., 611, 14 *Am. & Eng. Ency. of Law,* 2nd ed., page 297; *Bump on Fraudulent Conveyances,* 4th ed., section 600; *Gahoon* v. *Marshall,* 25 Cal., 202; 1 *Greenleaf on Evidence,* section 109; *Adams* v. *Davidson,* 10 N. Y., 312.

"The Court below was of the opinion that defendant Louise must have been shown to have intended the fraud and to have been connected with it. If this were true as a proposition of law, her intention might be inferred from her conduct, and all the circumstances of the case. It is well said by Waite in his work on *Fraudulent Conveyances* (section 281): 'In litigations of the class under consideration, great latitude should undoubtedly be allowed in regard to the admission of circumstantial evidence for the purpose of proving participation in manifest fraud. Objections to testi-

mony as irrelevant are not favored in such cases, since the force of circumstances depends so much upon the number and connection. The evidence should be permitted to take a wide range, as in most cases fraud is predicated on circumstances, and not upon direct proof. And this is the well established rule. *Bump on Fraudulent Conveyances,* Section 590; 14 *Am. & Eng. Ency. of Law,* 2nd ed., 498, and cases cited.

"In this case, *the deed was made without consideration; the grantor continued to deal with the property as before; the deed was kept secret, and not placed of record;* when the wife was called upon to testify, *the husband objected;* the materials went into her property with her knowledge and with no statement to plaintiff as to her title. All these matters might be true, and yet the deed might have been made with no intent to defraud. But the circumstances certainly are such as to call for a full, fair and complete explanation. The burden was shifted upon the defendant to show that the transaction was honest and with no fraudulent purpose.

"The fact that a deed is kept secret and not recorded is a very potent badge of fraud."

This rule applies with even more force to voluntary transfers of personal property.

". . . Where, however, the transferee under circumstances which would naturally lead him, if acting in good faith, to take possession of the property, suffers it to remain in the transferrer's possession beyond the time reasonably necessary to perfect a change of possession, the situation itself establishes *prima facie* the existence of a mutual design to defraud the creditors of the transferrer; and relevant declarations of the latter made subse-

quent to the conveyance and while in possession of the property are competent against the transferee. . . ."

16 *Cyc.*, p. 1000;
Mobile Sav. Bank v. *McDonnell,* 18 Am. St., 137;
Bowden v. *Spellman,* 27 S. W., 602;
Bush v. *Helbing,* 134 Cal., 676;
Gallagher v. *Williamson,* 23 Cal., 331;
Williams v. *Hart,* 65 Ga., 201;
Jones v. *Kind,* 86 Ill., 225;
Creighton v. *Hoppis,* 99 Ind., 369;
Lehman v. *Chapel,* 68 Am. St., 550;
Gregory v. *Frothingham,* 1 Nev., 253;
Loos v. *Wilkinson,* 110 N. Y., 195;

TESTIMONY OF MRS. S. G. HARVEY ALLEGED TRANSFEREE CANNOT BE ACCEPTED AS EVIDENCE OF TRANSFER, AS HER STATEMENTS ARE IN HOPELESS CONFLICT.

We have heretofore pointed out the irreconcilable statements of Mrs. S. G. Harvey on the most material point in the case from her standpoint. These material statements are so at variance and are so contradictory as to render her testimony entirely worthless under the authorities.

The witness' testimony is disposed of absolutely by the opinion of Lord Chelmsford, in which he said:

"There was no means of determining upon which occasion he had sworn truly or falsely. All

that could properly be done was to regard his evidence as utterly unworthy of credit and to dismiss it without further consideration."

Kierzkowski v. *Dorion,* 5 Moore P. C. Cases (N. S.), 397.

It is true that counsel admits that her testimony is so inaccurate that she cannot be expected to remember "transactions occurring five years ago." We give our answer to this suggestion in the language of District Judge Hazel in *Wooster* v. *Trowbridge,* 115 Fed., 731:

"So that we find that this witness upon whose evidence claimants Lewis and Tillinghast are forced to rely has, during the progress of the litigation, made statements under oath of so contradictory a nature as to preclude the Court from giving any credence to his testimony.

"The foundation and stability of our jurisprudence depends upon the ascertainment of the truth in all controverted matters. Well-settled rules afford guidance in cases, where the evidence is in hopeless conflict, and assuredly such is the case at bar. True, the transactions to which it relates occurred fully a score of years ago; and, while testimony of this nature may not be wilfully false, yet it must be the subject of the severest scrutiny. Whether it be wilfully false, or that of a forgetful, weak, or vacillatory man of 69 years, the standard of proof must be supplied which the law requires to satisfy the mind of the Court, before relief can be granted."

The same Judge in *Timolat* v. *Philadelphia P. T. Co.,* 131 Fed., 263, said:

> "Considered in connection with his former testimony and the testimony of his father in the *Manning Case,* it has not the weight claimed for it. A witness who has had ample opportunity to narrate his connection with a transaction, and apparently fully relates the same, and thereafter, in another litigation, gives a different narrative in relation thereto, or one from which an entirely different inference may be drawn, is not usually to be depended upon for accuracy of statement."

District Judge Brown in *Marden* v. *Phillips et al.,* 103 Fed., 196, in a case somewhat similar to this, thus disposed of the testimony of such a witness:

> "I am furthermore of the opinion, upon the whole evidence, that no possession of the stock was taken and retained by Phillips prior to January 30th when the goods were removed to Woburn. In the original depositions of Gardner, MacDonald, Romsey, and Phillips, taken on March 1st, or prior thereto, *no reference is made to a key, or to locking up any part of the goods.* Phillips testified that he made confidential arrangements with Romsey, the bankrupt's clerk, to look out for his (Phillips') interests, but Romsey was not to let MacDonald know that he represented Phillips. This is inconsistent with evidence *given at a later date* that Romsey had the key to the back room, and that MacDonald only had access thereto with Romsey's consent. Romsey, professing to give a full account of the transaction, does not testify originally that he was put in charge for Phillips, or that he had a key. MacDonald testified originally that after the execution of the bill of sale he did business

without change, and that he knew of no arrangement between Phillips and Romsey until January 20th. The testimony as to the key, is, in my opinion, inconsistent with the original testimony of these witnesses, and is of little weight. As the bill of sale was a mere security, and was not recorded, and as no possession was taken and retained prior to January 30, 1900, the case seems to fall within *Drury* v. *Moors,* 171 Mass., 252, 50 N. E., 618; *Moors* v. *Reading,* 167 Mass., 322, 45 N. E., 760. See also, *In re Sheridan* (D. C.), 98 Fed., 406; *Casey* v. *Cavaroc,* 96 U. S., 467, 24 L. Ed., 779."

In the case at bar the parties agreed (?) primarily that he should retain the control and dominion of the stock at all times, and the testimony is that he did in fact retain, not only the apparent title, but the actual control and dominion, possession and entire ownership of the stock unmolested by any one. And the parties also agreed (?) that they should by appearances and by declarations lead all persons to believe and to credit him in the belief that he was the owner in reality of the stock in question.

And in the case at bar it was agreed (?) that there should be no visible or apparent change of the custody of the property, but on the contrary, that the custody and ownership, control and dominion of the property should appear as wholly and absolutely unchanged in order that the world might have evidence of the fact that there was no new owner of the property, but that the ownership rested in the alleged donor. In plain language, there was a deliberate

agreement to violate the very terms of the statute covering cases of this character. It is elementary that in order to make a valid gift the donor must surrender all control and dominion of the thing given. There must be an open renunciation; notice to the world. Secret gifts are abhorred both at law and in equity. If secret gifts should be allowed to prevail the commercial integrity of the world would be destroyed. Ordinary business transactions could not be safely conducted. Creditors could be defrauded with impunity and no relief could be afforded them. In endeavoring to obtain credit a creditor would say: "I own this property," and after obtaining credit he could secretly assign it to his wife. When his creditors are clamoring for their money for their just debts, he states that he has no property, that the property that he had when the debts were created and all of his available property he had secretly given to his wife. No court has ever endorsed any such proposition.

HARVEY EXERCISED EXCLUSIVE CONTROL OVER ALL OF THE CERTIFICATES: HE EXPRESSLY RESERVED CONTROL AND DOMINION OVER THE SAME, IF THE STATEMENTS OF TRANSFEROR AND TRANSFEREE ARE TO BE ACCEPTED AS TO TRANSACTION OCCURRING IN 1905.

In a case very similar to the one at bar and which is a leading authority, this precise question was discussed in *Bauernschmidt* v. *Bauernschmidt,* 54 Atl., 637, and Chief Justice McSherry in deliverying the opinion of the Court of Appeals in Maryland, said:

"It is true that 140 shares of the capital stock of Bauernschmidt Brewery Company stood in the name of the husband and wife as joint tenants—that is, tenants by entireties—and, if there had been no change made, perhaps a different situation would have been presented. But it must be borne in mind that on December 30, 1898, when the resolution was adopted to sell to the Maryland Brewery Company, the stockholders of the Bauernschmidt Brewery Company accepted the requirement of the purchaser that the stock of the vendor company should be turned over to the new concern, or to its projectors, and that, in accordance therewith, George Bauernschmidt assigned in blank the certificate of 140 shares of stock, whereby the muniment of whatever title Mrs. Bauernschmidt had wholly ceased to exist. When it is remembered that the whole of the property originally belonged to George Bauernschmidt; that the corporation which he formed, and which took over that property, was obviously created for mere convenience in the transaction of the business; that neither his wife nor children invested a dollar in the stocks; that he voluntarily placed the name of his wife in the certificate as a joint tenant after having canceled one that had been previously issued to her in her own name for 30 shares; that he was treated by all the others as the real owner of the 140 shares, as the minutes of the meeting of December 30, 1898, show; and that he then surrendered to Sperry, Jones & Co. the certificate for 140 shares, and himself received and exercised exclusive control over the entire cash proceeds of the sale—it can scarcely be contended that Mrs. Bauernschmidt still continued to be a shareholder in the Bauernschmidt Brewery Company, or retained, if she ever had, any interest in the purchase money paid for the property which had actually

belonged to her husband alone. There can be no perfected gift where there has been no complete surrender of dominion over the thing given. Now, George Bauernschmidt never did surrender control over the stock of the Bauernschmidt Brewery Company, even after the stock had been issued. He first put none in the name of his wife. Afterwards he gave her 30 shares and then he canceled that certificate and others, and issued the one for 140 shares. He was not only president of the company, but in fact the owner of all its property. He issued and canceled certificates, seemingly, as he pleased. When one of his sons died, in whose name 10 shares stood in two certificates, there was no administration of his estate; but the real and dominant owner simply canceled the certificates and made a new distribution of the stock, incorporating his deceased son's 10 shares in the 140 share certificate. He, and he alone, voted the 140 shares, and his final assertion of control over the certificate representing those shares was manifested when he transferred it in blank and delivered it to Sperry, Jones & Co. His dealing with the stock, and her acquiescence in what he did, and the fact that he could, and did, as the actual owner of all the property which the company possessed, exercise complete control over those shares, show that he never surrendered dominion over them, or put it out of his power to revoke the gift of them.

. . .

"There can be no gift which the law will recognize where there is reserved to the donor, either expressly or as a result of the circumstances and conditions attending the transaction, a power of revocation or a dominion over the subject of the gift. There must be no *locus penitentiae,* and there is always a locus penitentiae when the supposed donor may at any moment undo what he has done.

Brewer v. *Bowersox,* 92 Md., 570, 48 Atl., 1060; *Whalen* v. *Milholland,* 89 Md., 199, 43 Atl., 45, 44 L. R. A., 208. If the donor retains dominion over the thing given, precisely as he had control of it before the alleged gift was made, there is obviously no perfected gift, because there has been no change of possession, and there is still an opportunity to recant. The application of this principle to the facts in the record is not difficult" (pp. 642-3).

And let us apply this case to the Folger transaction. We find Harvey, long after the alleged delivery to Mrs. Harvey, giving Folger a part of the shares, and Folger returning the same to him and the new certificate being issued in his (Harvey's) name and later Harvey finally delivered the certificate to Fay as security for a loan.

DECLARATIONS OF DEFENDANT CONCERNING THE MATTERS IN ISSUE ARE ADMISSIBLE TO PROVE THAT HE OR SHE HAS MADE FALSE OR INCONSISTENT STATEMENTS REGARDING SUCH TRANSACTION WHEN FOLLOWED BY EVIDENCE OF THEIR FALSITY.

Under the above doctrine the inconsistent statements of the defendant Mrs. S. G. Harvey are primarily admissible.

"ADMISSIONS OF CONDUCT—In General. A party's conduct, including statements, so far as definitely connected with a fact in issue, is often relevant as circumstantial evidence of an admission."

16 *Cyc.,* 952-4.

And this rule has even been applied to criminal cases.

In *State* v. *Oliver,* 41 Pac., 955, the Court said:

> "Error is claimed in permitting the witness Moore to state what the testimony of the defendant was on the former trial of the case, and then contradicting these statements by other witnesses. It is conceded that admissions made by the defendant might be used against him, but it is claimed that the purpose of this evidence was to show that the defendant had sworn falsely on the former trial; that, for the purpose of obtaining an acquittal on that trial, he had concocted and testified to a story which was untrue. It is always competent to show the statements and claims made by a person charged with crime with reference thereto, and to show that such statements are false."

In *Mora* v. *People,* 35 Pac., 182, the Court said:

> "Abbott in his work entitled *Criminal Trial Brief* (Section 481), says: 'A declaration made by one accused of a crime, denying any criminal act, and explaining suspicious circumstances for his own advantage, is not a confession, and does not come within the rule that confession must be voluntary to be admissible.' Again (at section 513) the author says: 'Evidence of falsehood on the part of the accused in giving an account of himself, or of the transaction or his relation to it, is competent as affording a legitimate presumption of guilt. For this purpose the prosecution may prove such declarations of the accused, and then prove their falsity. It is evident that the assignment of error based upon the admission of this evidence is not well taken."

And this rule is laid down in *Wigmore on Evidence,* Vol. I, page 357:

> "In 1862, Bigelow, C. J., in *Egan* v. *Bowker,* 5 All., 452, (admitting evidence of subornation of a witness): 'The inference is a reasonable and proper one that a person having an honest and fair debt will not endeavor to support it by falsehood and fraud; and the fact that he resorts to such means of proof has a tendency to show that he knows he can not maintain his suit by evidence derived from pure and incorrupt sources."

And in *Wigmore on Evidence,* Vol. I, page 360, we find the following statement:

> "But so far as the other litigation involves substantially the same issue, or object, as the present one, a party's fraudulent conduct in the former, indicating a consciousness of the weakness of the case, carries the same indication for the present cause, since by hypothesis the two causes are substantially the same with reference to the party's motives. On principle, then, the misconduct of the party in other litigation should be received, provided the issue involved was in effect the same, or provided the interest at stake in that and the present litigation are so united that the motive to succeed unlawfully in the present case might be supposed to be furthered by fraud in the former one."

In *Commonwealth* v. *Devaney,* 64 N. E., 402, appears the following:

> "The defendant, after his arrest, asserted that on the night of the robbery he drove a dark horse. He also denied that he had ever seen Galant before he was confronted with him. Subsequently

he admitted having driven Galant on the night of the robbery in a coupe drawn by a gray horse. The jury were instructed that, if they should find that the defendant intentionally misstated material facts, they would have a right to take such misstatements as admissions of guilt. There can be no doubt that the statements made by the defendant were material and that they were false. If they were intentionally false, they tended to show the guilt of the accused. He testified that he knew at the time that Galant and the police officer were in search of the man who drove a gray horse. To divert suspicion from himself he said that he was driving a dark horse that night and that he had never seen Galant before. There can be no question of the admissibility of the evidence and this is conceded by the defendant's counsel. *Commonwealth* v. *Webster,* 5 Cush., 295, 316, 52 Am. Dec., 711, (s. c. reported by Bemis, 495, where the change by Chief Justice Shaw is more fully stated); *Com.* v. *Trefthen,* 157 Mass., 180, 199, 31 N. E., 961, 24 L. R. A., 235; *Com.* v. *Smith,* 162 Mass., 508, 39 N. E., 111; *Wilson* v. *U. S.,* 162 U. S., 613, 16 Sup. Ct., 895; 40 L. Ed., 1090; *People* v. *Arnold,* 43 Mich., 303, 5 N. W., 385, 38 Am. St. Rep., 182; *State* v. *Robinson,* 117 Me., 649, 23 S. W., 1066; *Walker* v. *State,* 49 Ala., 398. The ground upon which such evidence is admissible is that it is an admission by conduct from which the guilt may be inferred. It is of course not conclusive, and the weight to be given to it is to be determined by the jury."

And in 20 *Cyc.,* we find this statement:

". . . So where it is claimed that the consideration for a deed is an indebtedness from the grantor to the grantee, it is competent for a creditor attacking the deed to introduce the books of

account either of the grantor or grantee, *kept in the regular course of business, to show that they contain no entry of the debt.*"

INCONSISTENT STATEMENTS AND ADMISSIONS ARE PRIMARY EVIDENCE.

"What a party said in giving his testimony may be stated by any one who heard it. The admission is absolutely primary evidence. It is immaterial therefore upon principle that the party who made it is present in court and can be called as a witness."

16 *Cyc.*, 977.

ORDINARY RULES DO NOT APPLY IN CASE OF PARTIES—OF COURSE THE STATEMENTS OF A PARTY, MADE OUT OF COURT, ARE ADMITTED UPON A WHOLLY DIFFERENT PRINCIPLE FROM THAT WHICH GOVERN THE DECLARATIONS WE HAVE BEEN CONSIDERING. SUCH STATEMENTS ARE ADMISSIONS AND INDEPENDENT TESTIMONY, AS NO FOUNDATION IS NECESSARY FOR THEIR INTRODUCTION AS EVIDENCE.

Jones on Evidence, 2nd ed., p. 1086, sec. 851.

"Self-serving statements made by or through the accused out of court, explaining suspicious circumstances, may be proved against him, and their falsity may then be shown. The fact of their falsity admits them as indicating an attempt to explain away incriminating circumstances by falsehoods."

12 *Cyc.*, 429.

"Statements made by the accused in testifying voluntarily before the commissioner in bankruptcy

as to his trade dealings are admissible against him."

12 *Cyc.*, 429.

In *People* v. *Weiger,* 100 Cal., 358, the Court said:

"I *Bishop on Criminal Procedure,* Sec. 1255, lays down the rule, thus: 'The answers and other testimony which are voluntarily given as a witness in any case or proceeding, civil or criminal, as before a commissioner in bankruptcy, a grand jury, a coroner, a fire inquest, or any court in an ordinary lawsuit, are as admissions or confessions competent against him on any issue in a criminal case to which they are pertinent." See also 1 *Greenleaf on Evidence,* Sec. 225.

Under the above authorities it cannot be questioned that the plaintiff had the right to introduce in evidence the various inconsistent statements and conflicting accounts given by Mrs. Harvey. Hence we submit that the testimony of Mrs. Harvey on December 5, 1911, her subsequent testimony given on January 5, 1912, in absolute and complete contradiction, were properly admitted as primary evidence and need not have been introduced by way of rebuttal.

STATEMENT OF HARVEY'S ACCOUNTS AND HIS FAILURE TO DENY THEIR ACCURACY PROPERLY ADMITTED IN EVIDENCE.

"Where it is affirmatively shown, directly or circumstantially, that statements in accounts or reports of sales, bills of sale, book entries, notices to quit, reports of agents, or lessees, sailing lists, and the like, have been brought to a party's attention,

his failure to deny their accuracy may be relevant if dissent would naturally have been manifested by objection. The effect of failure to deny the truth of written statements is much increased if other statements in the same document are disputed. But where all liability is denied no inference of acquiescence in the correctness of amounts charged can be drawn from failure to object to them specifically.

16 *Cyc.*, 962-3.

In this connection we call the Court's attention to the testimony of the bookkeeper Wasserman, that he discussed the statements with Harvey and that he had no corrections to make and no suggestions with reference thereto.

KNOWLEDGE AND INTENT OF A GRANTEE OR DONEE IS IMMATERIAL.

"It is not necessary, in order to avoid a voluntary conveyance, that is, one not based on a valuable consideration, that the grantee should have been cognizant of the fraud, or should have actually participated with the grantor in his fraudulent purpose, or have been privy to it. It is wholly void, without reference to knowledge or want of it on the part of the grantee, and although the grantee or transferee was innocent of any fraudulent intent, and the good faith of the grantee does not render it valid" (*Moore on Fraudulent Conveyances,* Vol. II, 584).

Young v. *Heermans,* 66 N. Y., 374;
Beecher v. *Clark,* 3 Fed. Cas. No. 1, 223;
Hershey v. *Latham,* 46 Ark., 542;

Bush, etc., v. *Helbing,* 134 Cal., 676;
Chalmers v. *Sheehy,* 132 Cal., 459;
Lee v. *Figg,* 37 Cal., 328;
Wells v. *Schuster-Hax Nat. Bank,* 23 Colo., 534;
Mallory v. *Gallagher,* 75 Conn., 665;
Bauer v. *McKee,* 87 Ill. App., 434;
York v. *Rockwood,* 132 Ind., 358;
Gaar v. *Hart,* 77 Iowa, 597;
Spear v. *Spear,* 97 Me., 498;
Richards v. *Richards,* 98 Md., 136.

CERTIFICATE NOT SHOWN BY MRS. HARVEY, NOT VOTED BY MRS. HARVEY AND NOT CONTROLLED BY HER.

Mrs. Harvey never exhibited these certificates of shares to a single living human being, nor did her name even appear in connection therewith until November 26, 1909, when Harvey was admittedly insolvent.

HARVEY PAID ASSESSMENT.

There was one assessment levied on this stock on April 13, 1907. She did not pay this assessment, but Harvey paid it, and it was charged to himself on his private books (Test. —). It was never charged against Mrs. Harvey. Harvey's books clearly show strict dealing and accounting in all business transactions with his wife. For instance a small assessment of $500 was advanced by him to pay an assessment

levied on her stock in the Ocean Shore Railroad Company on February 21, 1907. It was charged to his wife. On January 11, 1907, he gave his wife $200 in cash; this too was carefully charged to her. In fact, so particular was Harvey to have his books truly indicate his transactions with his wife, that an advancement of $1.50 was with great care charged to S. G. Harvey. Nevertheless, the payment of $5,460.00, assessment No. 1, on 546 shares of Shore Line Investment Company at $10.00 a share, on April 13, 1907, is charged to J. Downey Harvey, not to Mrs. Harvey, the alleged owner at that date. He made no claim against Mrs. Harvey for this amount. It is undisputed that the books of the corporation show that this stock belonged to J. Downey Harvey. He voted the stock as his own, and never even allowed a single share thereof to rest in his wife's name. At various meetings and in writing he declared himself to be the "owner and holder" of all of the shares of stock in question. And this with the consent of his wife, continued up to the very moment that he became a hopeless insolvent on November 26, 1909, when, for the first time, it was transferred into his wife's name. He seeks to explain away this strongly condemnatory circumstance by this destructive statement made to his wife in June, 1905, according to the testimony of both:

> "A. I took them and handed them to her and told her they were the certificates as they came

from the Shore Line Investment Company that she was interested in that I had promised her, and I told her to keep them and take care of them, and they were of value, and they were endorsed; and I said, the reason they are remaining in my name is I am very largely interested in the Ocean Shore Railroad, and these two companies are associated in the development of one another, one depends upon the success of the other—now, I said, if I keep this stock in my name, which I will want to do, I want to show the PEOPLE that the Ocean Shore Railroad is interested in the success of this land company, and that I AM A LARGE HOLDER IN IT and that at all time I WILL BE READY TO HELP OUT GRANADA AS MUCH AS WE POSSIBLY CAN" Trans., p. 125).

TRANSFERS STOCK AS HIS OWN.

It appears, however, that in December, 1906, he transferred to J. A. Folger 66 shares of this same stock, and Mr. Folger returned the stock to him in December, 1907 (Trans., 130), and he again placed these same shares, not in the name of the alleged owner, his wife, but in his own name. He was careful to see to it that not a single share of this stock rested in the name of the alleged donee. No explanation is offered for this transaction. Mrs. Harvey's name did not appear on these certificates, both of which are in evidence, as endorser or endorsee or otherwise. Mr. Folger was not called upon to explain the transaction.

Whilst it is sought to explain away the entry of the stock as Harvey's on the books of the corporation, no explanation is vouchsafed with respect to *similar en-*

tries made in Harvey's private books in due course of business. Harvey, as before stated, kept an elaborate set of private books. The first important book is the Journal. This book shows, without dispute, that the first entry showing the transfer of the stock from Harvey to his wife was made March 31, 1910.

> "Q. I want to know whether you took that book away from the office or kept it in the nighttime in Mr. Harvey's regular business office? A. Yes, I kept it—it was Mr. Harvey's book—always at his office, except some evenings, occasionally, very seldom, that I took it home" (Trans., p. 101).

And the books were frequently at Harvey's residence.

THE LEDGER.

Mr. Harvey, through his various bookkeepers, kept a private ledger. Two significant accounts were in this book, an account under the caption: "Family Gifts and Allowances" is first. Under this is set out specifically gifts as alleged to have been made by the bankrupt to his wife; these alleged gifts are described in detail. For instance, among other things, we find Santa Cruz Beach Company stocks, 20 shares preferred, May 14, 1907, $1000. But nothing appears in this account, or in any other account, or anywhere in Harvey's books of the transfer of the Shore Line Investment Co.'s stock until March 31, 1910; long after he had become insolvent and when it became his duty to be just to needy creditors rather than

extraordinarily generous to a wife already possessed of ample means.

His books also show the gift of the Pacific Avenue lot, valued at $15,327.50 at the time when it was made in 1905, while he was still solvent.

TRIAL BALANCE BOOK.

Like all prudent business men of large affairs, Harvey kept a Trial Balance Book. This book was a general summary of the assets and liabilities of Harvey. The trial balance book shows that this stock was listed in the year 1905 as Harvey's stock and in each and every succeeding year consistently and continuously until October 31, 1909, just one month before the transfer on the books of the corporation. Immediately thereafter on March 31, 1910, the succeeding trial balance, the stock is dropped, for the first time, from the list of Harvey's assets.

HARVEY HAS KNOWLEDGE OF BOOKS.

Did Harvey have knowledge of his books and their contents? We quote Mr. Wasserman on this:

> "The witness then further testified: 'I sometimes discussed with Mr. Harvey entries in his books. He usually gave me pencil memoranda before I made entries. It was by this means that I got the knowledge to make entries in the books concerning the account with the Shore Line Investment Company. Either from that source, or from the stub of the check-book. Sometimes he made an entry on the check-book, sometimes I did, when I drew the check. The purpose of this

was so that proper entries could be made in his books, and I could have knowledge of his business. Mr. Harvey must have had knowledge of the entries in the trial balances. I gave him a statement of his account. He never went over them with me. The only entry in the trial balance, in relation to the Shore Line Investment Company stock, to my knowledge, was carried forward to January 1st, 1907, $18,150. It was carried that way up to the time I ceased to be his bookkeeper. I think the man who succeeded me as bookkeeper was Mr. Crosby."

Cross-examination.

"I was in the employ of Mr. Harvey from 1895 to 1908. After 1907 I helped him, but received no compensation for it. My present occupation is that of Secretary of the Pacific Company, owners of the Pacific Building. I have been in that place since I have left the employ of Mr. Harvey and the Martin Estate, in January, 1907. I am a bookkeeper and understand thoroughly the science of bookkeeping. In making these entries I entered them according to my own knowledge of bookkeeping. Mr. Harvey did not tell me how to make each and every entry that I made. Sometimes he gave me the check-book to make entries from, sometimes memoranda. As to the entries of the Shore Line Investment Co. stock my recollection is that he gave me a lead pencil memorandum.

"MR. WHEELER—Q. On each of the several occasions?

"A. Yes, I cannot say positively on each occasion, but I am sure there were memoranda given" (Trans., p. 111).

COUNSEL COMPLAIN THAT THE "LEARNED JUDGE OF THE TRIAL COURT FAILED UTTERLY TO GRASP THE SIGNIFICANCE" OF TESTIMONY OF MR. AND MRS. HARVEY.

On January 5, 1912, Mrs. Harvey's testimony given before the Referee, is a complete refutation of her testimony given on December 5, 1911. Her entire testimony taken before the Referee is in evidence and we quote from it. It cannot be reconciled with the testimony given on December 5, 1911. It is not a mere correction of that testimony.

Counsel complains that the learned Judge of the trial court seems to have failed utterly to have grasped the significance of Mr. and Mrs. Harvey's testimony (App. Brief, p. 5). We certainly must disagree with counsel. The learned Judge *did* grasp the significance of this testimony. He was unable to overlook the fact that Mrs. Harvey had testified on December the 5th, 1911, that she had had these shares of stock in her safe deposit box; that she gave dates when she placed them in the safe deposit box; that she made a memorandum of these events; that the records of the safe deposit company show that she could not have placed the certificates therein, at the times testified to; that she did not visit her box during these times, that when about to be confronted with the record, she changed her testimony and claimed she had kept them in a portable safe to which she and her maid, Lizzie Anderson, alone had access. Lizzie Anderson was not produced as a witness.

The learned trial Judge did not overlook the fact that she claimed to have received 300 shares of Shore Line Investment Co. stock on June 26, 1905, on Webster street in San Francisco, and that it appeared from her own cross-examination and the testimony of her daughter, Mrs. Barron, that on that date she was not in the State of California, but in New York City.

And the learned Judge *did not* fail to grasp the significance of counsel's own admission that Mrs. Harvey had no accurate memory as to the transaction in question; nor did the Court *fail* to grasp the *significance* of the fact that her memory was only refreshed when the records of the safe deposit company were about to be produced; nor did the Court *fail* to grasp the *significance* of the fact that her letter in which she acknowledged that she had not kept the stock in her safe deposit box during these years was not furnished to the counsel for the trustee until after the Referee had practically ruled that we should be given access to these records; nor did the Court fail to grasp the significance of the fact that when these records were finally produced, it clearly appeared that Mrs. Harvey had not visited her safe deposit box during the year 1905, and could not have placed therein the certificates, as originally testified to by her; nor did the Court *fail* to grasp the *significance* of the fact that Mrs. Harvey did actually visit her safe deposit box at least a dozen times between September 13th, 1906, and May 13th, 1910, and that she must

have known whether or not the stock rested in that box when she gave her testimony before the Referee on December the 5th, in 1911. The learned trial Judge *did not* fail to grasp the significance of the fact that according to Mrs. Harvey's own testimony this box contained very few articles; shares of worthless mining stock, an antique match-box, and some private letters, and in visiting her box on April 29th, 1910, May 11, 1910, May 12, 1910, and May 13, 1910 (Trans., p. 143), she must have known that it did not contain the very valuable shares of stock involved here; and the learned Judge did not *fail* utterly to grasp the *significance* of the fact that counsel's apology for the memory of Mrs. Harvey was not well taken; for she was not called upon to remember transactions of "five or six years ago," but merely as to the contents of her safe deposit box with which she was thoroughly familiar as late as May 13th, 1910, her testimony being given December 5th, 1911.

Nor did the Court fail to grasp the significance of the fact that Mr. Harvey

> "kept a set of private books in which were recorded, among other matters, transactions with his wife . . . and these books show the stock in question to have been his up to November 26th, 1909" (Opn. Trans., p. 30).

Nor did the Court fail to grasp the significance of the fact that in Mr. Harvey's

> "ledger there is an account of 'Family gifts and allowances.' In this account are recorded a num-

ber of gifts made by Harvey to his wife long prior to 1909, but there is no record of any gift of the shares of stock in question" (Opn. Trans., p. 30).

Nor did the Court fail to grasp the significance of the fact that

"Some time in 1909 or 1910, Mr. Harvey's bookkeeper Crosby wrote in the ledger, referring to the Shore Line Investment Company stock, 'This is the property of Mrs. H., and belongs to her' " (Opn. Trans., p. 30).

Nor did the Court fail to grasp the significance of the fact that

"The journal contained no entry in regard to this stock until after November 26th, 1909" (Opn. Trans., p. 30).

Nor did the Court fail to grasp the significance of the fact that

"In the book of trial balances, in February, November and December, 1906, January, 1907, February and March, 1908, and October, 1909, this stock is carried as the property of Mr. Harvey" (Opn. Trans., p. 30).

Nor did the Court fail to grasp the significance of the fact that

"This trial balance book shows that it was listed in the year 1905 as Harvey's stock, and in each and every succeeding year continuously, until and including October 1, 1909. In the succeeding trial balance of March 31, 1910, the stock is

dropped for the first time from the list of Harvey's assets" (Opn. Trans., p. 30).

Nor did the Court fail to grasp the significance of the fact that prior to November the 26th, 1909,

> "Mr. Harvey seems to have exercised a control and dominion over the stock as complete and effectual as though it were his individual property" (Opn. Trans., p. 31).

Nor did the Court fail to grasp the significance of the fact that

> "At various meetings of the stockholders of the company"

he declared that he was the owner and holder of the shares of stock in question (Opn. Trans., p. 31).

Nor did the Court fail to grasp the significance of the fact that

> "April 15th, 1907, Harvey paid an assessment of $10 per share, or $5,460, on this stock. This amount was not charged to Mrs. Harvey, though less than two months before he had paid a $500 assessment on her Ocean Shore Stock, with which she was debited" (Opn. Trans., p. 32).

Nor did the Court fail to grasp the significance of the fact that it was Mr. Harvey's habit to give pencil memoranda to his bookkeepers in order that particular entries could be made, and that therefore Mr. Harvey must have had knowledge of the entries in the trial balance book.

And a great number of other significant facts are specially commented on by the learned trial Judge in his opinion, including Mr. Wasserman's statement to Mr. Harvey.

We might safely rest this case upon the opinion of the trial Judge, for he has completely reviewed the entire record. We have pointed out, however, only a few matters considered by the Court in determining the case.

EXCUSES FOR MRS. HARVEY'S FAULTY MEMORY FAIL AS SHE CLAIMS TO HAVE HANDLED THE STOCK AS LATE AS OCTOBER OR NOVEMBER, 1909, AND THE RECORDS SHOW SEVERAL VISITS TO HER BOX IN MAY, 1910.

If she gave the stock to Harvey in October or November, 1909, and the safe deposit records show she visited this box as late as May the 13th, 1910, and hence must have known the contents thereof, under the authorities the testimony of Mrs. Harvey does not help her case, but on the contrary it proves the case of the plaintiff.

If she gave the stock to Harvey in October or November, 1909, she MUST HAVE KNOWN WHETHER SHE HAD TAKEN IT FROM HER SAFE DEPOSIT BOX OR PORTABLE SAFE. Her memory did not have to take her back to transactions occurring five or six years ago.

It will be borne in mind that Mrs. Harvey on December 5, 1911, testified specifically and in detail that she at all times kept the shares of stock in question in her safe deposit box in the First National Bank

vaults, that she had placed the certificates therein on the dates of their reception by her and had kept them there ever since.

Subsequently on January 5, 1912, she changed her testimony and became equally positive that she had placed those same shares of stock in her portable safe in her own home and had kept them there at all times since the date of her reception of them. Her memory did not have to go back "five or six years ago," for these reasons:

(1) Harvey on April 13, 1907, paid an assessment on those shares of stock and subsequently to that date, according to his own testimony, *he procured the certificates from Mrs. Harvey,* and according to his statement she gave them to him in order that the payment of the assessment might be stamped upon the back of the certificates. Did she procure these certificates from her safe deposit box to give to Harvey, or did she take them from her portable safe?

ACCORDING TO THE TESTIMONY OF BOTH MR. AND MRS. HARVEY IN OCTOBER OR NOVEMBER, 1909, THE EXACT DATE OF WHICH IS UNNECESSARY, HARVEY AGAIN PROCURED FROM MRS. HARVEY THE CERTIFICATES OF STOCK IN QUESTION TO DELIVER TO CHARLES W. FAY TO ENABLE HIM TO NEGOTIATE A LOAN ON ALL OF THE SHARES OF STOCK OF THE CORPORATION FOR THE BENEFIT OF THE COMPANY. Did she then procure these certificates of stock in question from her safe deposit box or from her portable safe?

If Mrs. Harvey had had the certificates in her possession and handled them in June, August and September, of 1905, she surely would have known whether she kept them in her safe deposit box or her portable safe when she gave her testimony on December 5th, 1911.

If Mrs. Harvey had had the certificates in her possession and handled them in December, 1906, she surely would have known whether she kept them in her safe deposit box or her portable safe when she gave her testimony on December 5th, 1911.

If Mrs. Harvey had had the certificates in her possession and handled them in April and again in December, 1907, she surely would have known whether she kept them in her safe deposit box or her portable safe when she gave her testimony on December 5th, 1911.

If Mrs. Harvey had had the certificates in her possession in 1908, she surely would have known whether she kept them in her safe deposit box or her portable safe when she gave her testimony on December 5th, 1911.

If Mrs. Harvey had had the certificates in her possession and handled them in October or November, 1909, she surely would have known whether she kept them in her safe deposit box or her portable safe when she gave her testimony on December 5th, 1911.

If Mrs. Harvey visited her box on April 29th, 1910, and again on May the 11th, 1910, and again on

May the 12th, 1910, and again on May the 13th, 1910, the box containing very few articles, she surely would have known whether she had these certificates in that particular safe deposit box or her portable safe, in giving her testimony on December the 5th, 1911. COUNSEL CONTENDS, HOWEVER, THAT THE RECORDS OF THE SAFE DEPOSIT COMPANY WERE NOT ACCURATELY KEPT, AND HE RELIES UPON THIS TESTIMONY OF ROBERT FINN:

> "Q. But you have known of omissions, have you not? A. Yes, probably there was" (Appellant's Brief, p. 46).

It is true that the witness Finn testified, under cross-examination of counsel, as follows:

> "Q. But you have known of many omissions, have you not? A. I do not know. We try to get them as near as possible. Q. But you have known of omissions, have you not? A. Yes, probably there was" (Trans., pp. 130-131).

But we were not dealing wholly with omissions from the record; we were dealing with the record introduced, showing actual visits, and there is no claim that these visits did not occur just as recorded (Trans., p. 143). Indeed, the record entries of visits were most precise as to person and time. For instance: "Mrs. S. G. Harvey, 12:17 P. M., April 29, 1910"; "Mrs. S. G. Harvey, 10:27, May 11, 1910"; "Mrs. S. G. Harvey, May 12, 1910, 11:02 A. M.," etc., and in the light of this statement of counsel, we cannot understand why

it is that he now objects so strenuously to the consideration of the records of admissions to the safe deposit box.

> "MR. WHEELER—I would like to know the purpose of counsel in offering this evidence. Counsel is undoubtedly entitled to this evidence in the course of the trial, but it is not coming in in its regular order; if a question arises as to the veracity of Mrs. Harvey, the claimant of this stock, that is evidence; anything which will throw light upon that subject, your Honor is entitled to, and there will be no opposition on our part to the fullest investigation, but proper order of proof is that this testimony should come in in the form of rebuttal of Mrs. Harvey's testimony" (Trans., p. 129).

Under the authorities which will be cited, this was substantive evidence. Mrs. Harvey had testified that she received these certificates in various amounts on certain specified dates, and that on receiving the certificates she placed them in her safe deposit box. She fixed the time by memorandum:

> "June 26, 1905, 300 shares;
> August 22, 1905 40 shares;
> August 22, 1905, 26 shares;
> September 26, 1905, 180 shares."
> (Trans., pp. 133 and 167.)

It surely became important for the Court to know whether she had placed the shares in the box during these times. The records showed that she *did not* visit her box during the times stated by her and shows

that she did not visit the box during the times specifically mentioned by her; but whilst Mr. Finn was upon the witness-stand, with these records, we find counsel finally making this admission:

> "We make no claim that the stock was left in the safe deposit box" (Trans., p. 132).

It will be borne in mind that this admission was only given when the fact itself was apparent to everybody. The records of the safe deposit company show two things conclusively: 1. That Mrs. Harvey was well aware of the contents of her safe deposit box up to May 13th, 1910, at least, and that she had this knowledge whilst giving her testimony on December 5, 1911; and 2. That she did not have in that box these certificates as she originally claimed and testified.

We submit that the accuracy of these records cannot be questioned by counsel in view of the circumstances surrounding their introduction.

PORTABLE SAFES KEEP NO RECORDS.

As pointed out in *Jordan* v. *Crickett,* 99 N. W., 164, "chests as depositories for valuables have this advantage over banks, *they keep no record.*"

If her self contradictions on what is conceded by counsel to be a vital and important point in the case may be explained away because of the alleged ancient character of the transaction, then how may her forgetfulness of these transactions of recent date be explained

away? We submit this matter to the Court without further comment.

COUNSEL'S ASSERTION THAT MR. HARVEY'S BOOKS OF ACCOUNT DID NOT TEND TO SHOW THE CONTINUED POSSESSION OF THIS STOCK BY MR. HARVEY IS ERRONEOUS.

Counsel say:

> "The Court will bear in mind that the sole fact in issue was as to whether or not there had been a delivery of the possession in 1905 of these certificates of stock" (Appellant's Brief, p. 19).

Counsel then say:

> "To say the least, Mr. Harvey's books were not kept in business-like fashion, and we submit that it is simply absurd to argue that the failure of this utterly inaccurate system of bookkeeping to show the gift of this stock to Mrs. Harvey is insufficient to overthrow Mr. Harvey's testimony" (Appellant's Brief, p. 22).

Counsel seem to argue that every record, whether Mr. Harvey's records, or the records of a well-conducted safe deposit company, are unworthy of consideration when applied against his client. Entries in books, hitherto unquestioned, become inaccurate when affecting counsel's case. We contend that Harvey's books WERE ACCURATELY KEPT AND THAT HARVEY WAS AWARE OF THE CONTENTS OF HIS BOOKS AND THAT THE ENTRIES WERE MADE PURSUANT TO HIS WRITTEN

INSTRUCTIONS AND THAT HIS BOOKKEEPERS WERE SKILLED ACCOUNTANTS.

Mr. Edwin Adams Wasserman, a friendly witness for the Harveys, testified on cross-examination by counsel for the appellant,

> "I was in the employ of Mr. Harvey from 1895 to 1908—thirteen years. My present occupation is that of Secretary of the Pacific Company, owners of the Pacific Building. I AM A BOOKKEEPER AND UNDERSTAND THOROUGHLY THE SCIENCE OF BOOKKEEPING. In making these entries I enter them according to my own knowledge of bookkeeping. . . . As to the entries of the Shore Line Investment Co. stock, my recollection is that he gave me pencil memoranda. MR. WHEELER—Q. On each of the several occasions? A. Yes. I cannot positively say on each occasion, but I am sure there were memoranda given."

And the witness further testified:

> "I never made any notations among the accounts which I kept in that ledger of any gift of that stock to Mrs. Harvey. MR. SCHLESINGER—Q. Was it your custom to make notations of that character when you learned the facts? A. Well, I could not say yes—or no. Q. I will ask you whether you gave this testimony appearing on page 40? 'Was it your custom to make notations of that character when you learned the facts?' A. It was, certainly. Q. And you were asked again, 'It was?' and did you say 'Certainly'? What is your answer as to that? A. It is pretty hard to say one thing at one time and one at another. So I presume it was my statement. Q. You do not

impeach the integrity of this record, do you, Mr. Wasserman? A. I do not" (Trans., p. 110). . . . "The purpose of this was so that proper entries could be made in his books and I could have knowledge of his books." . . . "Mr. Harvey must have had knowledge of the entries in the trial balances. I gave him a statement of his account" (Trans., p. 110).

There is no presumption either that Mr. Crosby was an incompetent bookkeeper, and the difficulty of counsel's position is that to make his point good he is not only compelled to show that the ledger was incorrectly kept, but that the cash book, the journal and the trial balances were also incorrectly kept; and he is not only compelled to show that Mr. Wasserman was an incompetent bookkeeper, but that Mr. Crosby likewise was an incompetent bookkeeper; and to further make his point good he must show that Mr. Harvey was unable to read or understand his own private books of account.

"FAMILY GIFTS AND ALLOWANCES."

Under this is set out specifically gifts as alleged to have been made by the bankrupt to his wife; these alleged gifts are described in detail. For instance, among other things, we find Santa Cruz Beach Company stocks, 20 shares preferred, May 14, 1907, $1000. But nothing appears in this account, or in any other account, or anywhere in Harvey's books of the transfer of the Shore Line Investment Co.'s stock until March 31, 1910; long after

he had become insolvent and when it became his duty to be just to needy creditors rather than extraordinarily generous to a wife already possessed of ample means.

His books also show the gift of the Pacific Avenue lot, valued at $15,327.50 at the time when it was made in 1905, while he was still solvent.

Mr. Crosby was the bookkeeper for Mr. Harvey from the spring of 1908 and is still in his employ (p. 71). On March 31, 1910, he entered on page 58 of the Journal this entry: "Family gifts and allowances, " Shore Line Investment Co. $23,610.00 transferred " to Mrs. S. G. H. of S. L. I. stock J. D. H. states " this stock was originally purchased for Mrs. H." This witness reluctantly testified that this entry was made on March 31, 1910, and he made this significant statement in answer to this question:

> "Directing your particular attention to these words, 'this stock was originally purchased for Mrs. H.', who made that entry?
>
> "A. As I stated these entries were made at the time Mr. Harvey asked me to make a statement for him; about the time these bankruptcy proceedings were pending and I made all of these entries WITH A VIEW OF PUTTING HIS BOOKS IN AS EXACT A CONDITION AS POSSIBLE AS WOULD REFLECT THE CONDITION OF HIS AFFAIRS" (page 72).

HARVEY CONSULTED WITH CROSBY AS TO ASSETS.

This witness first denied that he was in the habit of going over Mr. Harvey's assets with him, but his testimony taken before the Referee, in evidence here, on that point is as follows:

> "Q. Did you go over all of Mr. Harvey's assets with him? A. Yes" (page 75).

And as to when he received the information from Mr. Harvey that the stock belonged to Mrs. Harvey, he testified:

> "I know that some time during 1908 or 1909 he gave me instructions to note at the head of the account in the ledger of the Shore Line Investment Company that the stock belonged to Mrs. Harvey" (page 76).

But under date of October 31, 1909, he again noted the stock as the property of Mr. Harvey (p. 77).

The words "This stock was purchased for Mrs. Harvey and belongs to her" were written in 1909.

Crosby, Harvey's bookkeeper, endeavored to deny that he had received any information from Mr. Harvey with respect to the entries. His testimony may be thus illustrated:

> "The only account that Mr. Harvey was interested in to any extent was his cash account, which was balanced from month to month. The other books I had at my home and possibly a year would elapse before I would make any entry in them. He would give me memoranda from time to time

from which I would make entries, and any entries that were necessary I made in accordance to such memoranda" (Trans., p. 121).

This clearly shows the endeavor of the witness to protect his present employer and whilst perhaps some may seek to commend his loyalty, it certainly should not commend itself to any court of justice.

"I made the entry on page 44 of Mr. Harvey's ledger reading: March 31-1910, F. G. & A. (meaning Family Gift and Allowances) 546 shares, 23,-610. That entry was made within a comparatively short time after that date."

"He did not ask me to make that entry."

"He would give me memoranda from time to time from which I would make entries, and any entries that were necessary I made in accordance to such memoranda. He instructed me, prior to March, 1910, to make an entry of this gift to Mrs. Harvey. I cannot say positively when, but at some time during 1908 or 1909 he gave me instructions to note at the head of the Shore Line Investment Company account, in the ledger, that the stock belonged to Mrs. Harvey" (Trans., p. 121).

HARVEY'S DECLARATIONS OF OWNERSHIP IN BOOK OF DAILY BALANCES.

The following entries appear in the private trial balance book of Mr. Harvey:

"Ledger Folio	Title of Accounts	Line No.	February, 1906 Dr.	Cr.
44	Shore Line Invt. Co.	30	18,150	
	" " " "		November, 1906 18,150	
	" " " "		December, 1906 18,150	
	" " " "		January 1st, 1907 18,150	
	" " " "		Feby. 29/1908 23,610	
	" " " "		Mar. 1/09 After Closing 23,610	
	" " " "		Oct. 31-1909 26,110."	

"I do not know that I talked to Mr. Harvey on the subject of this stock before I made the entry appearing in the trial-balance book, ledger folio 44, debit, Shore Line Investment Company, $26,-110; I presume it was prior to that time that he directed me to make the notation at the head of the account in the ledger."

Hence it appears from the testimony of this witness that on October 31st, 1909, he himself made the above entry, being the last in the trial balance sheet offered in evidence (Trans., p. 122, and see p. 127).

> "Any entries which I made in these books except ordinary bookkeeping entries, WERE TAKEN BY MEMORANDA GIVEN TO ME BY MR. HARVEY, OR FROM INFORMATION WHICH HE GAVE TO ME VERBALLY FROM WHICH I MADE MEMORANDA." . . . (Trans., p. 122).

The debit side of the trial balance book is nothing more nor less than a summary of assets. The entries here made refer to those contained in the ledger and summarize the situation. They show a continuous ownership of this stock by Harvey up to October 31, 1909, *less than one month prior* to the recorded transfer on the books of the corporation (Trans., p. 127).

HARVEY'S STATEMENTS AS TO HIS LACK OF KNOWLEDGE OF HIS PRIVATE BOOKS ARE HIGHLY IMPROBABLE, ARE DISCREDITED BY CIRCUMSTANCES, AND ARE AGAINST COMMON EXPERIENCE AND OBSERVATION AND ARE CONTRADICTED BY HIS OWN BOOKKEEPERS.

It will be remembered that Harvey is a business man of wide experience. He was the president and controlling factor of two very large corporations, he was and still is the active head of the Shore Line Investment Company, with power to sign checks, make contracts and execute deeds. No man may successfully charge him with a lack of business sagacity,

or question his intelligence. Mr. Harvey, nevertheless, endeavors to have the Court believe that he was wholly and utterly unfamiliar with his business affairs and especially with the entries in his private books intended for his own guidance. We quote from his testimony on cross-examination:

> "I have had bookkeepers from 1905 to 1909 whom I regard as competent men. I might have given them some memoranda, but never assisted them in carrying it out. . . . When an entry was to be made regarding a matter exclusively within my knowledge, I furnished the information to the bookkeeper. This was generally by memorandum, but might be verbally. I did not deem the entries in my books of importance to anybody but myself. I have no particular fault to find with the method of keeping my books" (Trans., p. 155).

The attention of the witness was then called to page 44 of the ledger under the head "Shore Line Investment Co." and to the notation "This stock was purchased for Mrs. H. and belongs to her." The witness further testified:

> "That notation was made by Mr. Crosby. He took charge of my books March 1st, 1908, and the entry is in his handwriting. It is very likely that I told him to make the notation" (Trans., p. 156).
> ". . . Referring to my trial balance, these books were not gotten up for public inspection. . . . They were intended solely for my private guidance in my private business transactions" (Trans., p. 158.
> "It was not my intention that the stockholders of

the Ocean Shore Railroad or its creditors should inspect my books" (Trans., p. 158). . . .
"Referring to my trial balance made up in February, 1906, I was not in the habit of examining my trial balances. I had no interest in them. I never examined my trial balances in the years 1905 to 1910. Up to that time I did not know that they had been keeping a trial balance. I knew that there was a ledger and a cash book and a journal. I never looked into the journal, and never looked into the ledger in relation to the Shore Line stock" (Trans., p. 159). . . .
"I never saw any entry of it in my books, and did not know until a long time afterwards that it was there entered as my property (Trans., p. 159). Referring to the statement dated September 22, 1907, written by Mr. Wasserman, I did not receive it. It might have come into my possession, but I do not remember when I received it. Q. Do you recall whether or not upon your examination of this statement furnished to you by your bookkeeper that you examined and noticed this particular writing, 'Shore Line Investment Co., 23,610'? A. Yes, but the way he places it he does not consider it one of my assets. Q. I will ask you to answer my question, yes or no. A. Well, I noticed that item and I did not consider it a part of my assets. Q. I ask you whether you noticed the item? A. I noticed the item. Q. Did you discuss the matter of this report with Mr. Wasserman? A. I do not think I did. Q. You never had a word of discussion with him? A. Not to my recollection" (Trans., p. 160).

According to the testimony of Mr. Wasserman, this statement was called for by Mr. Harvey (Trans., p.

103), and he and Mr. Harvey discussed the contents of the statement (Trans., p. 109).

> "I discussed the letter with Mr. Harvey subsequent to its writing and told Mr. Harvey that in view of his condition something should be done to reduce his liabilities and interest charges. He had no suggestions to make in regard to the letter" (Trans., p. 112).

And the witness further testified:

> "I note the summary designation of this letter as a summary of assets and that I have included in there the value of the Shore Line Investment Company's stock. I think that Mr. Harvey and I had some conversation in regard to that matter, but I cannot remember it distinctly" (Trans., p. 113). I cannot say distinctly that at the time I wrote that letter I was not aware of the fact that Mrs. Harvey had any interest in that stock; if I had known that it was Mrs. Harvey's, I presume that I would have noted it in my letter, JUST AS I DID IN OTHER CASES" (Trans., p. 115).

THE ACTS AND CONDUCT OF MR. HARVEY SUBSEQUENT TO THE ALLEGED GIFT ARE OF REAL SIGNIFICANCE AND ARE CONTROLLING NOTWITHSTANDING THE ASSERTION OF COUNSEL IN THEIR BRIEF.

Let us again ask what are the acts and conduct of J. Downey Harvey with respect to the alleged gift?

(1) He at all times voted the shares of stock as his own.

(2) He declared in writing that he was the owner

and holder of the shares of stock in question up to 1909.

(3) He made solemn declarations to his bookkeepers up to 1909 that he was the owner of the shares of stock in question.

(4) He made declarations to his bookkeepers in order that his books might reflect the true condition of his affairs.

(5) He furnished written data and memoranda to his bookkeepers from which they were instructed to enter upon Harvey's private books that he was the owner of said stock.

(6) He paid the only assessment levied upon said shares of stock during the time in question. It was not charged to his wife. (It will be borne in mind that there were no dividends paid until after November, 1909, a significant fact concerning which it is unnecessary for us to make comment.)

Mrs. Harvey's connection with the shares in question is nowhere shown. Did Harvey lie to himself? Did Harvey deceive himself? Did he deceive his bookkeepers?

The statement of his affairs furnished him at his own request in September, 1907, shows him to be the owner of the shares of stock in question. As to his ownership we have furnished the Court with the highest character of evidence, namely: the entries in a

man's private books made pursuant to his declarations to his own bookkeepers in due and regular course of business.

We do not believe the Court will look with favor upon the suggestion of counsel that this conclusive evidence has not significance.

And it is a significant circumstance that Harvey himself states that there was a very close and intimate connection between the Land and the Railway Companies, of both of which he was President, and that shortly after the time the Railroad Company went into the Receiver's hands, the Land Company commenced to pay large dividends.

THE EVIDENCE SHOWS THAT THE TRANSFER OCCURRED IN 1909 AND NOT IN 1905.

The evidence as to the date of alleged delivery clearly preponderates in favor of the plaintiff and shows that delivery occurred not in 1905, but in 1909.

We contend that the evidence of the plaintiff far outweighs the evidence of the defendant.

(1) Harvey's Ledger.

(2) Harvey's Journal.

(3) Harvey's Book of Trial Balances.

(4) Harvey's statement of September 22, 1907.

(5) Harvey's written memoranda to his bookkeepers.

(6) Harvey's statement to his bookkeepers.

(7) Harvey's voting the stock.

(8) Harvey's payment of the assessment.

(9) Harvey's written declaration that he was the owner and holder.

(10) Harvey's transferring part of the stock in 1906 to J. A. Folger.

(11) The transfer back of this stock from J. A. Folger to Harvey in 1907.

(12) The non-participation of Mrs. S. G. Harvey in any of these transactions.

(13) Consistent and continuous acts of ownership by Harvey over the shares of stock in question without suggestion upon the part of his wife during all these years.

EDWIN A. WASSERMAN (Bookkeeper).

(1) His entries in Harvey's ledger up to 1908 as Harvey's stock.

(2) His entries in Harvey's trial balance book up to 1908 as Harvey's stock.

(3) His statement to Harvey of September 22, 1907, of this stock as Harvey's.

(4) That the statement was accepted by Harvey as truly reflecting the condition of his affairs.

(5) His notations from information of the facts received from Harvey personally.

(6) His notations from pencil memoranda given him by Harvey.

(7) His testimony that the books were correctly kept.

(8) That the books truly reflect Harvey's condition of affairs.

(9) That the statement truly reflected Harvey's condition of affairs.

(10) That the entries were made with Harvey's knowledge and without correction on his part.

(11) That he made notations as he learned the facts.

(12) That all that he knew of the facts he learned from Harvey personally.

JAS. W. CROSBY (Bookkeeper).

His testimony substantially corroborates the testimony of Wasserman; except that he testified that about the time the bankruptcy proceedings were pending, he made certain entries at the request of Mr. Harvey with respect to the shares of stock in question (Trans., p. 120). The previous entries of Mr. Crosby, however, all show the ownership of the stock in Mr.

Harvey, and these entries were made upon the direction of Mr. Harvey.

> "He would give me memoranda from time to time from which I would make entries, and any entries that were necessary I made in accordance to such memoranda. He instructed me, prior to March, 1910, to make an entry of this gift to Mrs. Harvey. I cannot say positively when, but at some time during 1908 or 1909 he gave me instructions to note at the head of the Shore Line Investment Company account, in the ledger, that the stock belonged to Mrs. Harvey. I cannot point out in Mr. Harvey's journal any entry of this transaction which I made prior to the year 1909" (Trans., p. 121).

This entry in the ledger, made out of the ordinary course of business, "This stock was purchased for Mrs. H. and belongs to her," made about the time bankruptcy proceedings were pending.

BURKE CORBET.

(1) The books of the corporation conclusively show that Harvey was the owner and holder of all of the shares of stock in question.

(2) And he as Harvey's attorney and secretary of the corporation personally held the document in which Harvey described himself as the owner and holder of the shares in question up to 1909. He himself prepared the document.

CHARLES W. FAY.

(1) The delivery to him by Harvey in October or November, 1909, of all the certificates.

(2) Mr. Fay received them from Mr. Harvey and returned them to Mr. Harvey.

(3) The shares were endorsed by Mr. Harvey and not by Mrs. Harvey, the endorsement being necessary to enable Fay to make the loan from the bank.

(4) Mrs. Harvey's name did not appear on the certificates.

(5) She did not participate in the transaction.

MRS. S. G. HARVEY.

(1) Her testimony is admitted to be unreliable as to the transaction in question.

(2) She never exercised any CONTROL over the shares of stock in question.

(3) Her ownership was never made known to the world, and she knew that he was exercising sole control.

(4) She acquiesced in Harvey's control, dominion and management of the stock.

(5) She never exhibited the shares to a single living human being.

(6) She is guilty of innumerable self-contradictions as to her ownership of these shares.

(7) She testified to having placed the shares in her safe deposit box at various times during 1905, and then, when about to be confronted with the record of the company, she testified that she had placed them in a portable safe in her home to which she and her maid alone had access.

(8) She testified to having received a certificate for 300 shares on June 26th, 1905, in San Francisco, whereas, in truth and in fact, she was in New York at that time.

(9) She testified to having kept the stock in a safe deposit box at all times up to December the 5th, 1911, and was forced to admit that she had never had them in the box at all.

(10) She exercised no control of the certificates.

(11) She exercised no dominion over them.

(12) Her testimony is improbable, inconsistent and unsatisfactory, and her own counsel concedes that it is not accurate.

(13) Her testimony is unworthy of any consideration.

In view of all these facts, we are indeed surprised that counsel ask this question:

"DOES THIS COURT HOLD THAT IT IS USUAL OR CUSTOMARY WHEN A HUSBAND HANDS TO HIS WIFE IN HIS HOME A CERTIFICATE OF STOCK AS A GIFT, FOR HIM TO RUSH TO HIS BOOKKEEPER TO HAVE THE TRANSACTION ENTERED UP? ARE NOT THE CHANCES NINETY-NINE OUT OF A HUNDRED THAT HE WOULD NOT DO SO?"

(Appellant's Brief, p. 27.)

We are not compelled to discuss what is usual or customary in transactions of this character, but we *know* that Mr. J. Downey Harvey kept memoranda, entries and records of all his business dealings with his wife. The testimony shows that there was an account in the ledger under the caption "Family Gifts and Allowances."

> "It certainly was my custom to make notations of gifts when I learned the fact" (Testimony of Wasserman, p. 114, Trans.).

and the books show certain gifts to Mrs. Harvey, such as "Santa Cruz Beach Company stock"; "Pacific Avenue home"; "To cash, Mrs. Harvey, $200"; "To cash, Mrs. Harvey, $300"; "To cash, Mrs. Harvey, Ocean Shore Assessment No. 3, $500"; and all these are shown under their proper dates. (Trans., p. 101, 114.) And even such an insignificant sum of $1.50 was charged to Mrs. Harvey in the ledger. There-

fore, we answer counsel that in this case, it was usual for the husband, in making gifts to Mrs. Harvey, or in paying out sums of money for her, to rush to his bookkeeper to have the transaction entered.

Counsel states: "THAT ANOTHER ASSET WHICH HAD "BEYOND QUESTION BEEN GIVEN TO MRS. HARVEY WAS "CARRIED UPON THE BOOKS AS AN ASSET BELONGING TO "MR. HARVEY BY SOME ERRONEOUS METHOD OF BOOK-"KEEPING." (Appellant's Brief, p. 24.)

In this connection Mr. Harvey testified:

> "From my examination of my books concerning the gift of a lot to Mrs. Harvey, the item was carried, according to the trial balance, as my property until December in 1905, and the gift was made on the 28th day of February, 1905,"

and so counsel argue:

> "Here is a case where the property was actually deeded to Mrs. Harvey February 28, 1905; and yet the same is carried as an asset of Mr. Harvey's until December in 1905."

In other words, counsel makes the point:

THAT THE BOOKS LIKEWISE OMIT ACCURATE REFERENCE TO THE GIFT OF THE PACIFIC AVENUE LOT.

Counsel are clearly in error as to this. The books themselves covering this transaction are in evidence and these books show an accurate series of entries

covering the transaction. The ledger entries (see credit side ledger, p. 73) show the following:

"1905, Dec. 31, By personal expense, gift to Mrs. Harvey $15,327.50"

(the book valuation of the lot.)

The credit side of the ledger shows that Harvey paid the purchase price for the lot on February 27, 1905.

The book trial balances shows that this lot was carried as Harvey's asset in each of the trial balances from March 31, 1905, to December, 1905, inclusive. In February, 1906, the next trial balance shows that the lot is dropped from the list of Harvey's assets.

The entries in the books themselves, which of course are the best evidence of the fact, accurately show proper and usual entries with respect to all gifts at the time they were made, EXCEPT THE ALLEGED GIFT HERE IN QUESTION.

ADDITIONAL AUTHORITIES SHOWING THAT THE ENTRIES IN MR. HARVEY'S BOOKS WERE EVIDENCE AGAINST MRS. HARVEY.

These declarations were made while Mr. Harvey was in control of the shares of stock in question, exercising complete dominion over them. Counsel claim that these declarations are not admissible against a donee in a case where a fraudulent conveyance is charged. This is not the law. When the grantee

suffers her grantor to remain in possession and apparent control of the property which has been transferred to her, the declarations of the grantor are admissible as against the grantee. This qualification of the general rule is clearly stated in cases cited from California in the former part of this brief, and is recognized in *Jones' Commentaries on Evidence, (Blue Book, 1913)* which is freely quoted in appellant's brief.

See Vol. II, Section 241:

> "A little examination will show that the admissions are practically confined to that period between the acquisition of the property by the grantor and up to the alienation of it with the exceptions hereinafter noted as to fraud or the grantor remaining in possession after the execution of the conveyance." . . .
>
> "If the grantee permits the grantor to remain in possession after the conveyance, the declaration of the latter as to the nature of his possession and as to the good faith of the transaction are admissible."

See Section 351:

> "The declarations of persons in possession of personal property are often received as verbal acts characterizing and explaining the nature of such possession, that is, as part of the *res gestae. Possession, unexplained, is prima facie evidence of ownership in the possessor.* But such possession is entirely consistent with ownership in another; and therefore the conduct and declarations of the possessor may be material to show the nature of his possession, whether as owner, part owner or agent.

Thus the declarations of a debtor, while in possession of personal property, after a sale or transfer by him, which show fraud in the transfer, are admissible against the vendee, and in favor of creditors (citing many cases)."

See *Chamberlayne "Modern Law of Evidence"* 1913. Volume 4, Section 2610:

"With especial frequency the declaration of a debtor will be received to show the claim under which property is being held by him *after he has parted with the title to it,* where it is asserted by the creditors that the retention of possession by the vendor is evidence that the conveyance is intended to hinder, defraud and delay them in the enforcement of their rights. Such extra judicial statements are received as against the claims of the vendee."

Surely, no one will question that the ostensible title at least remained in Mr. Harvey; that he was exercising the actual control and dominion over it, and had possession of the very certificates themselves on the 26th day of November, 1909, the date upon which the trustee claims that the transfer was made. In this regard, the holding of the Court in the case of *Payne* v. *Elliott,* 54 Cal. 339, at 342, is pertinent. There it is held that a certificate is merely a symbol of the property, and that the shares of stock constitute the property itself. The Court says:

"It is, therefore, the 'shares of stock' which constitute the property which belongs to the shareholder. Otherwise, the property would be in the

certificate; but the certificate is only evidence of the property; and it is not the only evidence, for a transfer on the books of the corporation, without the issuance of a certificate, vests title in the shareholder: the certificate is, therefore, but additional evidence of title."

And see other cases cited.

THE MINUTES OF THE SHORE LINE INVESTMENT COMPANY CONSTITUTE EVIDENCE AGAINST MRS. HARVEY.

The minutes referred to contain numerous declarations in writing, some of them authenticated by Harvey's signature, affirming the fact that Harvey was the owner of the 546 shares of stock here in question. They also contain a record of conduct on the part of Harvey in voting this stock and in dealing with the corporation affairs, which show his entire and absolute dominion over the property and his continuous claim of title to the same. This evidence becomes particularly important in view of the following statement of Mrs. Sophia G. Harvey:

"I knew that Mr. Harvey was president of the Shore Line Investment Company at all the times I have mentioned, and was taking a very active interest in the Company's affairs. . . . As a matter of fact, I delivered all those shares of stock according to Mr. Harvey's directions" (Trans., p. 135).

TO SHOW BAD FAITH ON THE PART OF HIS OPPONENT, A LITIGANT MAY SHOW THAT HE HAS MADE INCONSISTENT STATEMENTS AS TO THE EXISTENCE OF SOME MATERIAL FACTS.

See Chamberlayne *"Modern Law of Evidence,"* Volume 3, Section 1787.

> "On the other hand, a party may, almost as a right, show bad faith on the part of his opponent, as well to the Court as to himself. He may for example prove that his adversary has tried to bribe or suborn witnesses; that he has suppressed evidence, destroyed documents or failed to advance his claim under proper circumstances.
>
> "Inconsistent statements. To show bad faith on the part of his opponent a litigant is usually entitled to prove that he has made inconsistent statements in regard to the existence of some material facts."

Section 1417.

> "Prominent among *admissions by conduct* is the making of false statements by the accused regarding important matters involved in the inquiry. The inference is the same which arises in other cases of fabrication or spoliation that one who seeks to deceive others or a court of justice as to the truth of the facts involved knows that he will be shown to be guilty, in a criminal proceeding or unsuccessful in a civil one, were the facts fully known."

See also *Jones' Commentaries on Evidence.* (Blue Book, 1913), Volume 2, Section 287, at page 575.

> "We have already seen that admissions are not limited to any particular form. They may not

only be in the form of declarations, verbal or written, but may be implied from the conduct or acts of the parties as well as from their language. . . . In like manner the demeanor of a party at the trial tending to show consciousness of wrong doing, false or deceptive explanation, and suborning, fabricating or suppressing testimony, may be shown."

And see authorities before cited.

ALLEGED ERRORS IN ADMISSION OF EVIDENCE ARE NOT PREJUDICIAL.

As we have clearly pointed out, the declarations of Harvey, the entries in his books made in due course of business and under his directions, and the declarations of Mrs. Harvey were offered and received as substantive evidence, and under the authorities were properly received. However, it affirmatively appears by the admissions of appellant that this same evidence could have been properly introduced in rebuttal of the testimony which she offered in evidence.

(Appellant's Brief, p. 39.)

The Transcript further shows, as heretofore pointed out, that in stating his objection to the admission of the records of the Safe Deposit Company, counsel for appellant conceded that such evidence would be properly received in rebuttal. He said:

"Anything that will throw light on that subject your Honor is entitled to, and there will be no

opposition on our part to the fullest investigation, *but the proper order of proof* is that this testimony should come in the form of rebuttal of the truth of Mrs. Harvey's testimony" (Trans., p. 129).

We respectfully submit that, where a case is tried before a Chancellor, without a jury, and submitted upon the whole body of the evidence and considered at large, it makes little difference whether evidence was improperly offered in support of plaintiff's main case, provided that it did become relevant and material to the issue before the case was finally submitted. It is a well known rule that error in regulating the order of proof is not prejudicial. Particularly is this true where the case is not tried before a jury.

City of Omaha v. *Water Co.* (C. C. A., 8th), 171 Fed., 647.

"The order of the introduction of evidence followed the course of the pleadings; but, were this not so, the mere admission in rebuttal of evidence necessary to a plaintiff's case in chief is not error. When a defendant is not surprised, and is afforded an opportunity to meet the evidence so admitted, his substantial rights are not prejudiced."

Chesterfield Mfg. Co. v. *Cotton Mills* (C. C. A., 4th), 194 Fed., 358.

"The sole question before us is, 'Did its admission constitute prejudicial error?' It is true that the plaintiff says that the Court erred in rejecting some testimony of one of its experts. It is immaterial whether it did or not. The witness was

in rebuttal allowed to give the evidence which had been excluded when he was under examination in chief."

And our own Appellate Court has sustained another phase of the same rule. It says, referring to a case where the cross examination of a witness was not confined to the limits of the examination in chief:

"But even if the witness Goldstein is not to be deemed, technically speaking, the actual plaintiff in the action it is clear that the admission of his testimony on the cross-examination was not error for which the judgment should be reversed, for the plaintiff was not injured thereby. The defendant could have called the witness in his own behalf and could have elicited the same testimony in his defense." Citing cases.

Calif. Fruit Canners v. *Lilly* (C. C. A., 9th), 184 Fed., 570 & 573.

And this general rule cannot now be questioned:

"The modern tendency of both legislation and the decisions of courts is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly relevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

(*Enc. U. S. Sup. Ct.,* Vol. II, p. 239.)

All the evidence to which appellant objects would have been admissible in rebuttal in any event. It was, we insist, however, admissible under the authorities as

substantive evidence, and it will be borne in mind that the burden of proving this gift rested upon the defendant. The plaintiff in the case, however, undertook the task of proving that the gift was made in 1909, and not in 1905. And the Court found that the plaintiff's claims were sustained by a preponderance of the evidence.

THE WASSERMAN LETTER OF SEPT. 1907, WHILE HARVEY WAS IN CONTROL OF THE STOCK WAS CLEARLY ADMISSIBLE AGAINST MRS. HARVEY.

This letter is referred to at length in the opinion of the Court. (Trans., p. 34, see also 103 to 109, inclusive.)

According to Mr. Wasserman, Mr. Harvey called for this statement, and according to Mr. Wasserman the statement was discussed with Mr. Harvey, and Mr. Harvey considered the statement, and had no suggestions to make in regard to it, and Mr. Harvey knew that the statement included the Shore Line Investment Company stock as one of his assets, and the statement was made upon the strength of the entries shown by the books which were made from memoranda furnished by Mr. Harvey. In practical effect, the statement was the statement of Mr. Harvey, and was an important item of evidence to be considered by the court in connection with all the other facts and circumstances shown at the trial.

It is submitted that under the authorities cited, there was no error in admitting this in evidence.

CONCLUSION.

Mr. Moore, in his valuable treatise on the weight and value of evidence, points out, that in suits to set aside fraudulent conveyances, it sometimes happens that the defendants attempt to prove the payment of a large amount of currency as consideration for the sale or mortgage of the debtor's property and the evidence consists of testimony that the party paying the money had not only acquired or accumulated it in a singular manner, but had kept several thousand dollars for years in a trunk or a box or a cupboard. It is often impossible directly to contradict the testimony, but the courts demonstrate that these stories on their face, and especially with the aid of a few extraneous circumstances, subject rational belief to greater strain than it can bear.

In a case in Maine a judgment debtor sought to set aside as fraudulent a conveyance by the debtor to his wife. The defendants alleged that the deed was made in 1881, was for $3000 paid at the time, the wife claimed to have $1000 in a stocking bag, which she began to accumulate in 1860, $1000 more in a calico bag, another $1000 in a pillow case. When the deed was given the husband was owing considerable money. The courts refused to believe the wife's story, saying: "We cannot rely upon testimony so incredible " to substantiate a consideration which would change

" the conveyance from a voluntary one into a bona " fide sale."

See

Miller v. *Hilton,* 88 Me., 429.

It is not inappropriate to quote here the statement of the Court in *Jordan* v. *Crickett,* 99 N. W. 164, a suit to set aside a fraudulent conveyance. The plaintiff told an amazing yarn upon his discovery of buried Spanish silver dollars in the Philippines, which he converted little by little into gold. He said he kept the identical gold for nearly three years in a chest in his father's house, and but for the attachment debtor's search for someone to whom he might sell his stock of goods in order to cheat his creditors, said the Court, "it might have been there still." "BUREAUS AND CHESTS AS DEPOSITORIES FOR MONEY," continued the Court, "HAVE THIS ADVANTAGE OVER BANKS, THEY KEEP NO RECORD, and the story as a whole may be said to defy contradiction save by its inherent improbability, its inconsistency with surrounding circumstances and contradictory statement. . . . The circumstances of this entire transaction are unusual and out of harmony with the ordinary course of business. The entire tale has all the argument of a manufactured story," and it was rejected as unworthy of belief.

And in the case at bar it may be suggested that portable safes keep no records, as pointed out by the

Court; safe deposit companies, however, keep a record showing admissions to safe deposit boxes.

Levy v. *Levy,* 57 Atl., 1012, was a suit to set aside a fraudulent conveyance. Both husband and wife told improbable stories. In commenting on the story of Mrs. Levy the Court said:

> "She says that she is no business woman. The whole testimony shows that she relied entirely upon the word of Simon Levy, and trusted everything to his honesty. She is in doubt whether she saw the property mortgaged, and it is quite clear, I think, that she did not. In fact, all the details of the visit do not seem to have made the slightest impression upon her. She cannot tell whether she ate in the house; whether she got beyond the store part of the building; whether she intended to stay all night, or to return the same day. Now, it is strange that the details of this single trip, made under such unusual circumstances, should have made upon her mind so faint an impression. Then again the manner in which she became possessed of the $5,000 is calculated to excite surprise."

On a careful review of the testimony in the case the Court held that it was too great a task on credulity to be required to believe the testimony in the case.

The liabilities to creditors in this case, wholly unsecured, amount to $200,000, and the assets are practically nil, amounting to less than $4000 (admissions in pleadings).

The alleged assets appearing in the statement of September 22, 1907, have disappeared with remarkable rapidity, and it is now sought to wrest from the

bankrupt the only available asset remaining for the creditors, and this asset was sought to be transferred away on the very date of the hopeless insolvency of the bankrupt.

In *National Bank of the Republic* v. *Hobbs,* 118 Fed., 627, a suit to set aside a fraudulent conveyance to a wife, District Judge Spear said:

> "Nor can it be with justice concluded in this case that the members of the firm of Hobbs & Tucker were unaware of the importance of *these books.* . . . How impossible then it is for the Court to accept the statement of Hobbs and Tarver THAT THESE BOOKS WERE REGARDED AS WORTHLESS and as RUBBISH. Had the transactions attacked by the bill and hereinafter considered been made with proper regard to the law, *these books,* if accurately *kept*—and there is no pretense that they were kept otherwise—would have been an absolute defense to every important charge made by the bill. . . . What were the liabilities of the insolvent firm? The answer of Richard Hobbs states the amount to be $225,000. In the absence of the books this statement can neither be verified or disproved. . . . It would be unjustifiable to the Court at this time to accept this indeterminate explanation, confronted as it is by the clear-cut evidence afforded by the CONTEMPORANEOUS ENTRIES on the BOOKS, made at a time when there was no opportunity for mistake and no motive to *recharge* or otherwise *falsify the account.* . . .
>
> "This circuitous transaction, however, apparently efficacious to remove the property of the debtor from the reach of his creditors, to a court of equity, which looks through forms to substance, is nothing more than a voluntary conveyance of the insolvent respondent to his wife, with intent to hinder, delay

> and defraud creditors, unless it appear that there was a valid and subsisting indebtedness from the respondent to his wife. In that event a direct conveyance to her in settlement of such indebtedness would have avoided many suspicious features which now thrust themselves upon the attention of the Court. . . . This was the PERSONAL LEDGER of the DEPOSITORS' ACCOUNTS, with which EVERY PASS BOOK ought to agree and balance, and yet a reference to this LEDGER SHOWS THEY OWED HER NOTHING." . . .

Mr. Hobbs was a successful lawyer with a large practice.

> "What induced him then in a manner wholly contradictory to the careful business methods by which he had amassed his large fortune, to leave his own money in the bank, and take his wife's money . . .? He kept neither memoranda, entry or record of his dealings with the moneys he alleged to be his wife's."

And after a review of the evidence the Court says:

> "With every disposition to accord the distinguished and aged lawyer, soldier and jurist, who is the principal defendant in the case, every right to which he is entitled, we are nevertheless constrained to conclude that the great mass of his property has been conveyed to his wife with intent to hinder, delay and defraud his creditors."

The plain effect of the transaction in the case at bar is to withdraw from the reach of creditors Harvey's sole remaining asset, according to his own evidence, and if this transaction may be upheld it would tend

to destroy the very spirit of the policy of the commercial laws of the land.

Our Section 3440 of the Civil Code is practically a modern reproduction of the laws laid down in the celebrated *Twyne's case,* decided in Star Chamber in 1601, and reported in 3 Coke, 80 b. No case has received greater attention upon questions of commercial law than the *Twyne case* and in this case divers points were decided:

> "First: That this gift had the signs and marks of fraud.
>
> "Second: The donor continues in possession and used them as his own and by reason thereof he traded and trafficked with others and defrauded and deceived them.
>
> "Third: It was made in secret.
>
> "Fourth: It was made pending the writ.
>
> "Fifth: Here was a trust between the parties, for the donor possessed all and used them as his proper goods and fraud is always apparelled and clad with a trust and a trust is the cover of fraud.
>
> "Sixth: The deed contains that the gift was made honestly, truly and *bona fide.*" . . .
>
> "And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole Court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud."

The case at bar contains all of these elements, including the element set out in the sixth subdivision, for in 1909 (when insolvent) we find Mr. Harvey causing to be entered in his book—"This stock is the property of Mrs. H. and belongs to her."

It is respectfully submitted that the judgment of the lower court is clearly sustained by the evidence, and that the findings in this case should be upheld and the decree affirmed.

Respectfully submitted.

BERT SCHLESINGER,
EDWIN H. WILLIAMS,
A. E. SHAW,
Solicitors for Appellee and Plaintiff.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

S. G. HARVEY,
Appellant and Plaintiff in Error,

vs.

B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt,
Appellee and Defendant in Error.

No. 2401.

POINTS DEVELOPED ON THE ARGUMENT, WITH ADDITIONAL AUTHORITIES.

A "CLEAR AND PALPABLE ERROR" IN THE REASONING OF THE TRIAL JUDGE ON THE FACTS.

The trial judge reasoned that the gift of this stock, if it had been made, would have been noted in Mr. Harvey's books of account; that all of the other gifts he made to her were so noted, and that his testimony that he made the gift in 1905, as claimed by him, must be rejected, largely because of the condition of these books (Tr., pp. 31 to 38 incl.). The error in drawing such a deduction is obvious; *for the fact is, that none*

of the other gifts of specific properties made by Mr. Harvey to Mrs. Harvey were correctly noted in his books, and one of such gifts, although admittedly made in 1907, was not noted in the books until March 31, 1910—the very date on which the gift of the stock in controversy was also noted.

There were but two gifts of specific properties, other than the gift in controversy. One of these was real property—a lot on Pacific Avenue. The other was of shares of Santa Cruz Beach stock. As to these gifts see Tr., p. 151.

1. *The Pacific Avenue Lot.*—This lot was deeded to Mrs. Harvey on February 28th; nevertheless, the gift was not entered upon Mr. Harvey's books until the 31st of the following December—10 months later (Tr., p. 161).

During all of that time this lot was carried on the books as one of Mr. Harvey's assets (Tr., pp. 161 and 164). It was never entered under the head "Family Gifts and Allowances"; nor was it entered as what it was—a gift of land. Under the heading "Pacific lot," etc., the following note was made *ten months* after the fact: "December 31, 1905, By personal expense, gift to Mrs. Harvey, $15,327.50" (Tr., p. 102). That was the only entry of that gift.

2. *The Santa Cruz Beach Stock.*—This stock was given to Mrs. Harvey in 1907 (Tr., p. 151). For three years it was not entered up in the books. Finally,

on March 31, 1910—*the identical date of the Shore Line Investment entry*—the following item appears under "Family Gifts and Allowances:" "March 31, 1910, Mrs. H. 20 shares pfd., May 14, 1907, $1,000" (Tr., p. 102).

Here we have a situation identical with that of the Shore Line Investment stock. One gift was made in 1906; the other, in 1907,—that is the only difference. Both gifts were omitted from the books until 1910, when, under date of March 31st, both were entered up in substantially the same way. One is admittedly valid. The other is repudiated upon the utterly inconsistent and indefensible ground that if it had in fact been made, it would, forsooth, have been entered in the books!

3. *The Gift in Controversy.*—As to the Shore Line Investment stock it is averred in the complaint that it was given by Mr. Harvey to Mrs. Harvey on November 26th, 1909. We know that the corporation transferred it to her on that day and she receipted for the same (Tr., p. 96). It is thus conceded in this case that these shares were given at least as early as November 26th, 1909. And yet no entry was made in the books any earlier, at most, than March 31, 1910, and it is probable that it was not made until the fall of 1910, contemporaneously with the inception of the bankruptcy proceedings (Tr., pp. 123 and 120).

It will of course be conceded that the entry on March 31st, 1910, affords no proof that the gift of

this particular stock was not made on November 26th, 1909—the date on which our opponents aver that it was made. How, then, can it be said that these same books afford any surer proof that the gift was not made as early as 1905?

We respectfully urge the Court to give full consideration to the situation which the foregoing facts regarding these three gifts present: Here is Mr. Harvey doubted and discredited and his testimony rejected by the trial judge because his books fail to show a timely entry of this transaction. And yet the only other gifts of specific properties which Mr. Harvey made to his wife—gifts admitted to have been valid—were not entered with any more accuracy, and one of them—likewise a gift of stock—was not entered for three years, and then it was entered on the very same date as the gift in controversy!

And note, too, that the very man who made the entry dated March 31, 1910, testified that Mr. Harvey told him to make the entry as early as 1908 or 1909, and that he had been told that the stock belonged to Mrs. Harvey, as early as April 13, 1907, he having been at that time employed by the corporation (Tr., pp. 120, 121, 128, and 116). Also, that he further testifies that on one occasion, at least, he was eighteen months behind in writing up his books (Tr., p. 125).

The trial judge ignores all of the matters we point out above. He draws the harsh and unwarranted conclusion that Mr. Harvey's testimony must be rejected

chiefly because there is no timely entry of the gift in his books. This, we respectfully submit, is a clear case in which the trial Court has fallen into what the cases cited by opposing counsel call "serious error of fact."

United States v. *Marshall,* 210 Fed. Rep., 597.

ANOTHER OBVIOUS ERROR IN THE REASONING OF THE TRIAL JUDGE.

The opinion of the trial judge contains the following:

> "A peculiar feature of this transaction is the fact that for more than four years Mrs. Harvey's ownership of the stock in question was concealed from the public. Mr. Harvey attempts to explain this by saying that he was very largely interested in the Ocean Shore Railroad, etc." (Tr., p. 44).

Concealed from the public! How? Mr. Fay knew of it. Mr. Corbet knew of it. Mr. Wasserman and Mr. Crosby both knew of it. Mrs. Baron knew of it. Whom, then, was it concealed from? The public has no right to see the books of the corporation. It was not a concealment, to carry the stock in Mr. Harvey's name on those books.

The Supreme Court of California in a recent case refers to:

> "The notion that 'the stock and transfer book' of a corporation is made a public record, accessible to all persons, intended to give notice to everybody of the status and ownership of the title to the stock, and that it is therefore available to the creditors of the stockholders and to persons dealing with them with respect to the stock. This is the

> law of some of the States where the rule contended for by the defendant prevails, but it is not the law of this State. . . . The creditors of the individual stockholders have no such right of access, and the books could not constitute notice to them. Nor could these books hold any person out to the world as the owner of any stock, since the world could not have access thereto. Stockholders and creditors of the corporation are the only persons who have the right to inspect the books (Civ. Code, Sec. 378)."
>
> *Nat. Bank, etc.* v. *Western Pac. Ry. Co.*, 157 Cal., at 581.

"A peculiar feature of this transaction!" Why "peculiar"? It is not a peculiar thing for one who is a stockholder, but not a stock *owner* to serve on a Board of Directors or act as an officer of the corporation. Mr. Folger was for a year a director under such conditions of this very corporation. Nor is the fact to be overlooked that the plaintiff Stowe, as Trustee in Bankruptcy, has succeeded to the ownership and possession of the ten shares of stock which belonged to Mr. Harvey individually. He has not had them transferred on the books during the past three years. They are the very shares which qualify Mr. Harvey at the present time to act as President of the Corporation (Tr., pp. 95-96). No one suggests that this is contrary to public policy, or a fraud. Is Mr. Stowe "concealing his ownership from the public?" and is his conduct "peculiar"?

THE CONFUSION REGARDING MRS. HARVEY'S WRITTEN MEMORANDUM.

Unless the several fragments of evidence touching this matter are brought together, the transcript is very confusing. Harsh inferences are drawn by counsel regarding the memorandum and the matter should be clearly set before the Court: Before the Referee in Bankruptcy, on December 5th, 1911, Mrs. Harvey testified that in June, 1905, Mr. Harvey gave her 300 shares of the stock; in August, 66 shares; and in September, 180 shares. She did not give the day of the month on which they were received (Tr., p. 133). She did not claim to state these facts as to the months named, from independent recollection, but "because she had put them down on a memorandum" (Tr., p. 134).

In response to a request from "the Judge" (Commissioner Kreft), Mrs. Harvey made the memorandum introduced in evidence (Tr., p. 168). This was made "about December 5, 1911" (Tr., p. 167).

She made this second memorandum up from the earlier memorandum which she had mentioned on the first hearing (Tr., p. 167). The earlier memorandum had consisted merely of the date of the certificates and the number of shares.

"I took the dates of the certificates, and not the dates of their receipt" (Tr., p. 166). "I entered on a little slip of paper the number of shares and the date of the particular certificate whenever I received one

from Mr. Harvey" (Tr., p. 167). "About December 5th, 1911, I copied them off on this memorandum and destroyed the slips" (Tr., p. 167). "After I had put them all on one paper, there was no necessity for keeping the slips and I destroyed them" (Tr., p. 174).

This second memorandum she handed in at the hearing before the Referee on January 5th, 1912 (Tr., p. 141).

"The dates on the certificates were approximately the dates on which they were received" (Tr., p. 167).

It thus appears that Mrs. Harvey had noted down at the time of their receipt, the dates of her certificates and the number of shares, but not the actual dates of delivery. The delivery to her, however, was made on "approximately" the dates of the certificates; and when she prepared the statement at the request of Commissioner Kreft, she put down the dates of the certificates as the dates of delivery—the actual dates of delivery being a fact as to which she avowedly had no independent recollection.

Many people as a matter of precaution keep just such memoranda as Mrs. Harvey did. The certificates did not stand of record in her name. Such memorandum would be of use in the event of theft of the certificates or their loss by fire. Mr. Harvey had told her when he gave them to her "to take care of them; that they were of value and endorsed." What she did was a natural enough thing for anyone to do. It certainly was not a thing so extraordinary as to render her testimony that she did it inherently improbable.

THERE WAS NO SHIFT IN MRS. HARVEY'S TESTIMONY AS TO DATE OF DELIVERY.

Counsel further charges that Mrs. Harvey testified positively to the delivery of the first certificate as having been in June, 1905, and that she corrected this testimony when it was shown that she was not here in June, 1905. But what are the facts? Mrs. Harvey stated, when first on the stand on December 5th, 1911, that she did not testify from independent recollection as to dates, but from this memorandum she had made, which as we have seen, consisted only of a note of the dates of the certificates and the number of shares in each (Tr., p. 167). Mrs. Harvey was not in California on June 26, 1905. The first information which counsel had from any witness in this case that she was not in this State at that time came frankly from Mrs. Harvey herself as follows:

> "On the 26th day of June, 1905, I think I was in San Francisco, but I am not positive. I was here very shortly after, if not at that date, during the first part of July. . . . I do not know what weeks of June I spent in New York. I think I was in New York the latter part of June, 1905. I do not know whether I was on the train on the 4th of July, en route to San Francisco. I went East and came back hurriedly. If I was here in the beginning of July I was in New York on the 26th. I think I was in New York or on the way back on July 4th" (Tr., pp. 173, 174).

AN OBVIOUS ERROR OF LAW REGARDING THE BURDEN OF PROOF.

The trial judge declares in his written opinion that Mrs. Harvey's claim "that the delivery was made in 1905 is an affirmative defense" (Tr., p. 45), and he

accordingly puts upon her the burden of proof. And counsel for Appellee say in their Brief: "It will be borne in mind that the burden of proving this gift rested upon defendant" (Appellee's Brief, p. 96).

This is obviously an erroneous view. To establish a fraudulent gift the plaintiff was compelled to allege and prove that the gift was made at a time when Mr. Harvey was insolvent; otherwise, the transaction would not be fraudulent. The date of the gift was an essential part of plaintiff's cause of action. Accordingly, the plaintiff alleged that the gift was made on November 26th, 1909—a date when Mr. Harvey admittedly was insolvent (Tr., p. 5). The defendant admitted the gift but denied that it was made on that date. The burden was therefore clearly on the plaintiff to prove his allegation.

> "The burden of proof in regard to an allegation of fraud, coming either from the plaintiff or from the defendant, rests upon the party who makes it. . . . He must prove the fraud, which means that he must show it by clear and satisfactory evidence, such as will preponderate over presumption or evidence on the other side."
>
> Vol. I, *Bigelow on Fraud,* 123.

> "Fraud is never presumed but must be affirmatively proved. On the contrary, the presumption, if any, is in favor of innocence, and according to general principles elsewhere discussed the burden falls on him who asserts fraud, whether he be plaintiff or defendant, to establish it by proving every material element of the cause of action by a preponderance of evidence."
>
> 20 *Cyc.,* 108, 109.

> "The law presumes that men are honest in their dealings;

and it is therefore well settled, as a general rule, that unless there is some special relation involving trust and confidence, or other exceptional circumstances, fraud is never to be presumed, but must be clearly proved by the party alleging the same."

14 *Am. & Eng. Enc. of Law,* 190.

"In an action by a creditor of the transferror, attacking such transfer on the ground of fraud, the burden of showing fraud rests upon the party asserting it. And a showing by him that the stocks in question were transferred in the manner indicated does not shift the burden to the transferee to prove the bona fides and full consideration of such transfer."

Culp v. *Mulvane et al.,* 71 Pac. Rep., 273 (syllabus by Court).

"It is never to be presumed that a party has committed a fraud, and where fraud is alleged for the purpose of depriving him of a right the facts sustaining it must be clearly made out."

McCarthy v. *White,* 21 Cal., at 503.

"It is claimed by the trustee that the transfer was colorable and in fraud of creditors; but I do not think such an inference is warranted from the mere assignment and failure to deliver, as the presumptions of law are in favor of the innocence of an alleged wrongdoer."

In re Hadley, 156 Fed. Rep., at 315.

COUNSEL'S CONTENTION THAT THE ERRORS IN THE ADMISSION OF EVIDENCE WERE NOT PREJUDICIAL.

The books of account, the Minutes of the Shore Line Investment Company, Wasserman's letter, Mrs. Harvey's testimony before the Referee in Bankruptcy, and the books of the Safe Deposit Company, were all of-

fered and received as substantive evidence in plaintiff's case in chief. Without them there was no evidence whatever, even remotely tending to establish plaintiff's case.

Now comes plaintiff and says that any error in so admitting this evidence was not prejudicial, because it was all admissible anyhow in rebuttal (Appellee's Brief, pp. 93 to 96). But nothing was brought out by defendant which rendered this evidence proper rebuttal. And it was not used by the Court as rebuttal,—it was used by the trial judge to impeach defendant's witnesses, and no legal foundation for its use for that purpose was laid.

> "The Code of Civil Procedure (Secs. 2051 and 2052) prescribes the method of impeaching witnesses, and they can be impeached in no way other than therein provided."

People v. *Harlan,* 133 Cal., at 20.

> "It is an elementary principle of the law of evidence, that if a witness is to be impeached, in consequence of his having made, on some other occasion, different statements, oral or written, from those which he makes on the witness-stand, as to material points in the case, his attention must first be called, on cross-examination, to the particular time and occasion when, the place where, and the person to whom he made the varying statements. In no other way can a foundation be laid for putting in the impeaching testimony."

C., M. & St. P. Ry. v. *Artery,* 137 U. S., at 519.

> "The rule is well settled in England, that a witness cannot be impeached by showing that he had made contradictory statements from those sworn to, unless on his examination he was asked whether he had not made such state-

ments to the individuals by whom the proof was expected to be given. . . .

"This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enables him to explain the statements referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony.

"This rule is generally established in this country as in England. . . . Such evidence is always inadmissible until the witness whose testimony is thus sought to be impeached, has been examined upon the point, and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation.

"The letter appears to have been written six years before the deposition was taken which the letter was offered to discredit. This shows the necessity and propriety of the rule. It is not probable that, after the lapse of so many years, the letter was in the mind of the witness when his deposition was sworn to. But, independently of the lapse of time, the rule of evidence is a salutary one, and cannot be dispensed with in the courts of the United States."

Conrad v. *Griffey,* 16 How., at 46-47 (21 Curtis, 24-25).

See also:

Mattox v. *United States,* 156 U. S., at 245-6.

DECLARATIONS OF A DONOR ADMISSIBLE ONLY IF MADE WHILE DONOR IS PROVED TO BE IN POSSESSION.

In our opening brief, on pages 37 and 38, we made reference to the authorities which lay down the rule that in order that the declarations of a donor of personal property are relevant against the donee, they must be made while the donor is in possession, and we quoted, among others, from *Walden* v. *Purvis,* 73

Cal., at 519, in which it is directly held that "a declaration of the donor after he had parted with the property was inadmissible either to prove fraud or otherwise."

The diligence of our opponents has failed to find a single case to the contrary. Not a single authority of the many quoted by them in their brief (see pp. 33 to 37 incl.) fails to make it clear that it is only while the declarant *is in possession* that his declarations become evidence against his transferee.

The question of possession was the very question at issue. Whether Mr. Harvey had the possession of the certificates from 1905 on, or whether Mrs. Harvey had possession of them, was the fact which the Court was seeking to ascertain. The Court had no right to assume Mr. Harvey's possession; but what the Court did was first to assume that Mr. Harvey was in possession and then to use his declarations to prove that he was in possession. This, of course, was error.

THE POTENCY OF THE TESTIMONY OF MESSRS. FAY, CORBET, ET AL.

The following authorities throw light upon the potency of corroborating evidence of the kind testified to by these witnesses:

> "Whether or not there was a gift of these deposits by Moses Sprague to his wife depends wholly upon his actual intention. He did everything necessary to the validity of the gift, if he intended a gift. . . . If he intended to do this, and intended it as a gift, the gift was complete. . . .
>
> "His purpose was a matter between him and her exclu-

sively, and was manifested and could be proved by his contemporaneous declarations, or by his declarations made before or after delivering the orders. There is no better proof of intention than declared intention, and it is often the only means of proof."

Sprague v. *Walton,* 145 Cal., 228, 233, 234.

"On this subject in *People* v. *Doyell,* 48 Cal., 90, the Court say: 'Such declarations may, however, be admissible in contradiction of evidence tending to show that the account is a fabrication of late date, when it may be shown that the same account was given before its ultimate effect and operation could have been foreseen; and also, perhaps, in other peculiar cases.' And in *Barkly* v. *Copeland,* 74 Cal., 4, it is said: 'It has been frequently held that when the witness is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist'."

Electric, etc. Co. v. *Safe Deposit, etc. Co.,* 145 Cal., 124, 130.

"There are exceptions; but they are of a peculiar nature, not applicable to the circumstances of the present case; as where the testimony is assailed as a fabrication of a recent date, or a complaint recently made; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted."

Ellicott v. *Pearl,* 10 Peters, 439 (12 Curtis, at 186).

"It is contended by the appellants that all statements . . . of admissions made by John W. Holland that he had given the stock to his wife are inadmissible, . . . It must be borne in mind that the statements of John W. Holland, sought to be excluded, were made by him when he was entirely free from debt. The question is, therefore, whether declarations of a husband, who is free from debt at the time the declarations are made, are admissible to prove a gift in favor of his wife. Upon well-settled principles, we answer

this question in the affirmative. Not only was the gift in question made when the donor was free from debt, but his declarations touching the gift were practically contemporaneous therewith and made when, as shown by the record, from the nature of things, he could have had no suspicion of the financial difficulties in which he was subsequently involved by the speculations of his brother. . . .

"To hold inadmissible the declarations of the husband made under the circumstances of the case in judgment, would be, as said by the learned judge of the circuit court, to defeat a class of benefactions which, under certain conditions, are not only lawful, but are in a high degree commendable."

First Nat. Bank v. *Holland,* 39 S. E., 126, 128.

THE REFEREE IN BANKRUPTCY, UPON THIS SAME EVIDENCE, HAS RECENTLY REACHED A CONCLUSION DIRECTLY OPPOSITE FROM THAT REACHED IN THIS CASE BY THE COURT BELOW, AND JUDGE DOOLING HAS GRANTED MR. HARVEY HIS DISCHARGE.

We quote the following from the "Referee's Report on Opposition to Discharge," filed by the Referee in Bankruptcy "In the Matter of J. Downey Harvey, Bankrupt," on May 9, 1914:

"The matter was submitted upon . . . the entries contained in the bankrupt's cash book, ledger, and journal, *and upon the record in the case of B. S. Stowe, Trustee, against Sophia G. Harvey, pending in this court.*

"Specifications 1 and 2 charge the bankrupt with having knowingly and wilfully made false oaths in this bankruptcy proceeding. Specifications 4 and 5 charge the bankrupt with having concealed from his Trustee in Bankruptcy certain shares of stock of the Shore Line Investment Company alleged to belong to his estate. . . .

"Specification 1 alleges that . . . the bankrupt was the owner . . . of 546 shares of the stock of said Company, subject only to a fraudulent conveyance of the same made by him to his wife. . . .

"Specifications 4 and 5 relate to the alleged fraudulent

transfer made by the bankrupt to his wife of 546 shares of stock of the Shore Line Investment Company.

"I have reached the conclusion . . . that the specifications have not been maintained. . . .

"It appears from the evidence that 546 shares of stock of the Shore Line Investment Company claimed by the trustee to be of the value of about $100,000.00 stood upon the books of the Company in the name of the bankrupt until 1909, and was carried in Mr. Harvey's books as his property up to that time, when it was transferred on the books to his wife. He testified that this stock was purchased for his wife in 1905 and was delivered to her at that time, and it is his contention that at the time he swore to said answer he had no interest in said 546 shares of stock. . . .

"Whatever may be the correct rule as to the degree of proof required in the specifications alleged, the evidence to sustain the same must at least be convincing. The evidence has not convinced me that the bankrupt knowingly and fraudulently made false oaths in his answer or upon his examination in the bankruptcy proceedings, or that he has concealed property from his Trustee in Bankruptcy.

"For the foregoing reasons I find that the specifications in opposition to the bankrupt's discharge and none of them, have been proven" (Referee's Opinion, pp. 1, 2, 3, 7, 9, and 11).

Judge Dooling on June 1st, 1914, confirmed said Referee's report, and granted Mr. Harvey his discharge.

The referee in bankruptcy is the same Commissioner Kreft before whom Mrs. Harvey gave her testimony regarding the place where she put the certificates of stock when the same were first given to her and afterwards corrected it.

The evidence to establish fraud "must at least be convincing." "The presumption is in favor of honesty." One judge has pronounced for fraud, dishonesty, and perjury. Another on the same record has

declared that fraud, dishonesty, and perjury are not proven.

Under the foregoing conditions, the slightest mistake of fact on the part of the trial judge becomes a "serious error of fact," and errors of law which ordinarily might not be deemed prejudicial, become of controlling importance.

We have pointed out errors both of fact and of law, which we submit would have demanded a reversal of this decree even if the honor and reputation of the defendant were not involved.

We ask that the judgment be reversed and that the court below be directed to enter a decree in favor of Mrs. Harvey.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for S. G. Harvey, Appellant
and Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT.

S. G. HARVEY,
Appellant and Plaintiff in Error,

vs.

B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt,
Appellee and Defendant in Error.

No. 2401.

RESPONSE TO SUPPLEMENTAL POINTS FILED BY APPELLANT.

Without previous notice to the appellee, counsel for plaintiff in error has filed with the clerk of this court a brief entitled: "Points Developed on the Argument, with Additional Authorities."

In this document, counsel has included matters not appearing in the record, and entirely foreign to the issues and has also made certain erroneous statements, and, unless the Court's attention is called thereto, serious error might occur in the consideration of this appeal.

THE BOOKS OF ACCOUNT REFERRED TO IN THE OPINION OF JUDGE FARRINGTON HAVE NOT BEEN INCLUDED IN THE PRINTED RECORD.

Counsel is clearly in error in his statement that there were but two gifts of specific properties other than the gift in controversy. There were a large number of gifts to Mrs. Harvey, as shown by the journal and the ledger, as well as many alleged sales made by J. Downey Harvey to his wife, and some of the gifts appear in the statement of September, 1907.

We are not here concerned with the bona fide character of these transactions. Apparently proper entries were made of these other transactions. We neither question nor admit their validity. This case is confined solely to the Shore Line Investment Company stock. We do know that these books were kept by competent bookkeepers who made entries according to Harvey's directions. These well-kept books show conclusively that after the time of the alleged gift entries were made which declared affirmatively that Harvey was the owner of this stock.

In 1910, when bankruptcy impended, Harvey sought to overcome the effect of these continuous entries by inserting a statement that the stock belonged to Mrs. H.

MRS. HARVEY DIRECTLY CONTRADICTS MR. HARVEY IN SEVERAL PARTICULARS.

Here is a fair sample of the "convincing testimony" relied on by counsel for the appellant to sustain this alleged gift of 1905:

MRS. S. G. HARVEY.

"I never had any discussion with Mr. Fay in regard to the Shore Line Investment Company. . .

"Mr. Harvey *never* asked me for *possession of my stock so that he could deliver it to Mr. Fay.* He never asked me for the possession of the stock at any time except for Mr. Folger, except that in 1909 he asked me for the stock again, because there was a second assessment" (Trans., 135-136).

J. DOWNEY HARVEY.

"Early in November, 1909, we were negotiating for a loan to pay off our indebtedness in the Shore Line Investment Company. When he (Mr. Fay) came to me, I said: 'As you know, that is Mrs. Harvey's stock, *and I will have to get it from her.* She is down at Del Monte and it will probably take a day or so. *I will communicate with her and get the stock.' I got the stock from Mrs. Harvey and turned it over to Mr. Fay,* General Manager of the Shore Line Investment Company" (Trans., 153).

CHARLES W. FAY.

"The earliest date that I saw these certificates was the latter part of October or the first part of November, 1909. They were not endorsed to Mrs. Harvey, but simply in blank, as I recall them" (Trans., p. 175, in response to questions of the Court).

Here we have Mr. Harvey in ACTUAL possession of the stock up to October, 1909. He testified that he got the certificates from Mrs. Harvey. Mrs. Harvey, however, denies it. From whom did he procure them?

Mrs. Harvey claims to have had the stock with her in Del Monte (Trans., p. 138). Her statement that there was a second assessment in 1909 is not borne out by the admitted fact that "only one assessment was ever levied or paid on the Shore Line Investment Company" (Testimony of Corbet, Trans., p. 94).

Harvey paid this assessment and it is entered upon his book as follows:

"April 13, 1907, Cash Assessment No. 1,
546 shares at 10, 5460"
(Trans., p. 100).

Mrs. Harvey apparently had no knowledge of either the Fay transaction or the payment of this assessment, Harvey to the contrary notwithstanding.

Here is another sample of the "convincing testimony" relied upon by counsel and urged in his document entitled "Points Developed," etc.

MRS. HARVEY'S WRITTEN MEMORANDUM.

Counsel states: "It thus appears that Mrs. Harvey had noted down at the time of their receipt THE DATES OF HER CERTIFICATES AND THE NUMBER OF SHARES BUT NOT THE ACTUAL DATES OF DELIVERY."

Perhaps the ingenuity of counsel may bring forth

that construction of this plain document in her own handwriting:

"EXHIBIT NO. 9.

300 shares DELIVERED June 26, 1905;
On August 22, 1905, RECEIVED 40 shares;
On August 22, 1905, RECEIVED 26 shares;
On September 22, 1905, RECEIVED 180 shares"
(Trans., pp. 167-168).

"I remember the dates on which these certificates WERE GIVEN me, because I put them down on a memorandum" (Trans., p. 134).

And she prepared this memorandum, she testified, from slips which she had made at the time of "receiving" the alleged gifts. These slips, not more than four in number, for some undisclosed reason, were destroyed, she testified.

Counsel argues now that the word "delivered" does not mean "handed over"; that the word "received" does not mean "obtained"; and to make his contention good in this and all other respects he dramatically refers to the "honor and reputation of his clients." He will probably concede that the honor, reputation and integrity of courts is of far more importance than any personal considerations of clients, and counsel surely realizes that all persons stand alike in this tribunal.

In speaking of Mrs. Harvey's testimony concerning

this memorandum and her subsequent explanation, Judge Farrington said:

> "It is difficult to avoid the suspicion that this change in Mrs. Harvey's testimony was made in order to escape the effect of the evidence shown that she was in New York in June, 1905, at the time she says she received the certificate for 300 shares from Mr. Harvey" (Trans., p. 44).

THE REFEREE IN BANKRUPTCY DID NOT UPON THIS SAME EVIDENCE REACH A CONCLUSION DIRECTLY OPPOSITE FROM THAT REACHED IN THIS CASE BY THE COURT BELOW.

Counsel have seen fit to depart from the record in this case, and, for purposes not disclosed, to include wrenched portions of an opinion in an entirely different matter, involving different issues. He has also brought in the name of Judge Dooling in such a way as to indicate that he, Judge Dooling, upon this same evidence, pronounced an opinion contrary to that of Judge Farrington in this cause. This proceeding upon counsel's part is absolutely and wholly unwarranted. The printed record in this case contains only two opinions: the opinion of Judge De Haven, appearing on page 24 of the transcript, in which, in granting an injunction after a vigorous contest, he stated:

> "There is certainly a very material conflict in the affidavits filed upon the present hearing, and I do not now express any opinion as to the weight to be accorded the several affidavits or as to the

merits of the controversy raised by the bill of complaint and the answers thereto. It is sufficient to say that under the rule stated in the case of *Southern Pacific Co.* v. *Earl* (82 Fed., 690). I deem it a proper exercise of discretion to grant the preliminary injunction asked for," etc. (Trans., pp. 25-26).

His Honor, Judge De Haven, heard the case on affidavits and decided that the testimony was conflicting. His Honor, Judge Farrington, heard the same evidence from the mouths of living witnesses, and examined documentary evidence and he held that the preponderance of the evidence was with the plaintiff. The two opinions appearing in the record both favor the plaintiff.

Judge Dooling made his order confirming the Referee's report without argument, without objection and without any examination of the record. He at no time rendered any opinion in this case. The report of the Referee in a different proceeding, involving different issues, was presented to him and no opposition was made to the discharge of Mr. Harvey before Judge Dooling, and for the reason stated, that the available assets of Mr. Harvey had disappeared, leaving only the asset which we have recovered.

Now, that counsel has seen fit to interject this opinion of Commissioner Kreft into this record for the obvious purpose of influencing the judgment of the Court, we shall take the liberty of pointing out, 1, the absolute irrelevancy of the opinion to the issues in-

volved, and 2, some of Mr. Harvey's assets, and what became of them.

The specifications of creditors in opposition to Mr. Harvey's discharge set out that he had wilfully and intentionally made a false oath, in that he had denied owning any interest in valuable properties which he, in fact, owned, controlled and collected huge revenues from.

His own counsel concede expressly in their briefs, that Mr. Harvey's oath was in fact false, and that it was material, but claim that it was made inadvertently, and without a fraudulent purpose, and the Referee accepted this excuse as sufficient.

The Referee's report shows that Mr. Harvey was the owner of a two-fifths interest in the Columbian Building, in San Francisco, and that he was in regular receipt of the sum of Twelve Hundred Dollars a month as rental from this building. The building was deeded to his mother, Eleanor Martin, and to his two half-brothers, Walter and Peter Martin, on March 11th, 1908, by deed absolute, but the deed was not recorded until May 5th, 1910, and at all times, subsequent to the making of the deed, "Mr. Harvey continued to receive monthly rentals from the Columbian Building of Twelve Hundred Dollars a month."

It developed upon Mr. Harvey's examination that the deed absolute which he made to this valuable property was in reality nothing but a mortgage, and he continued to be the real owner of the fee simple

title and received the rents. Nevertheless, he saw fit to deny positively, under oath, that he was the owner of any interest of any kind or character in the property. After long consideration, the Referee decided that the creditors had not offered convincing proof that Mr. Harvey's false oath was taken wilfully and with a fraudulent purpose. The Referee conceded in his opinion that the fraudulent conveyance of the 540 shares of stock involved in this action had been made by Mr. Harvey to his wife, but his decision is based on that provision of the Bankruptcy Act which provides that "fraudulent conveyances made more than "FOUR MONTHS BEFORE A PETITION IN BANKRUPTCY "IS FILED IS NOT SUFFICIENT GROUND UPON WHICH TO "DENY THE BANKRUPT'S DISCHARGE." Section 14 is relied upon by the Referee and quoted in full in this opinion.

The recent case *In re Heneberry,* 31 A. B. R., 231, January, 1914, is quoted by the Referee as authority on that point to this effect:

> "Under Section 14 of the Bankruptcy Act the concealment, transfer or removal by the bankrupt of property with intent to hinder, delay or defraud his creditors must be within the four months immediately preceding the filing of the petition in bankruptcy, to warrant the withholding of the discharge upon that ground. . . If Congress had intended that the transfer of property by the bankrupt in fraud of creditors or by concealment thereof by him with such intent, at any time prior to the bankruptcy, no matter how remote, would

> bar a discharge, it surely would not have limited the transfer or concealment for such purpose to a time within the four months immediately preceding the filing of the petition in bankruptcy. To hold that a fraudulent transfer of property made more than four months prior to the filing of the petition in bankruptcy will bar a discharge would be in plain disregard of the Act of Congress."

In our case the fraudulent conveyance was made on November 26th, 1909, and the petition in bankruptcy was not filed until November 2nd, 1910, nearly a year later, and his answer to the petition was filed June 21, 1911, and the authority of the Heneberry case made it impossible for the Referee to reach any other conclusion than that which was actually made. He himself says in his decision:

> "I do not deem it necessary to review the testimony given in the case of Stowe against Harvey, which was put in evidence in this hearing. The opinion of the Court in that case fully reviews the evidence. The facts presented, it seems to me, come within the holding of the case of Heneberry."

We thus find that the Referee in Bankruptcy did not attempt to overrule the judgment of Judge Farrington and did not criticize Judge Farrington's opinion, and did not reach a different conclusion upon the same evidence, as stated in appellant's brief. The Referee in Bankruptcy had different issues presented to him than those which were presented to Judge

Farrington, and, in view of the law, all that the Referee could or did decide was that a fraudulent conveyance of property by a bankrupt to his wife, made nearly a year before the petition in bankruptcy was filed, could not be accepted as satisfactory proof that the bankrupt concealed his assets from his Trustee in Bankruptcy.

The opinion of the Referee discloses one important thing not pointed out by counsel for the appellant. Mr. Harvey in this case professes profound indifference as to this statement of September 22, 1907.

> "Q. Did you discuss the matter of this report with Mr. Wasserman?
> "A. I do not think I did.
> "Q. Never had a word of discussion with him?
> "A. Not to my recollection" (Trans., p. 160).

It appears from the statement itself that it was furnished Mr. Harvey at his request (Trans., p. 103). It concludes with the paragraph:

> "I would advise a careful study of the above with the view of disposing of all your assets that you possibly can at a valuation a little in advance of the above if possible and paying off the debts as fast as possible, etc." (Trans., p. 108).

Amongst Mr. Harvey's assets listed in this statement of September the 22nd, 1907, we find the "Columbian Building, $275,000." And although he paid little attention to his statement, the opinion of Commissioner Kreft shows that on March the 11th, 1908,

this asset of $275,000.00 in value was deeded by Harvey to Eleanor Martin, his mother, and Peter D. Martin and Walter S. Martin, his brothers.

The allegation of our complaint is that the estate of the bankrupt has sufficient assets to pay only two per cent. of the claims of less fortunate creditors, and this allegation is undenied in the answer. And if the bankruptcy proceedings show that fortunate creditors were relatives, this fact would not alter the legal or equitable aspects of this case.

In this discussion, we have endeavored to confine ourselves only to the record and the foreign matters injected by counsel. If the Court is interested or deems it material to inquire as to what became of the other assets, appearing in statement of September, 1907, we very gladly invite an inspection of the bankruptcy proceedings.

ERRONEOUS STATEMENT OF APPELLANT AS TO STOWE, TRUSTEE.

Appellant makes the allegation in her final brief, that Mr. Harvey is even now qualified to act as President of the Shore Line Investment Company only by virtue of certain shares standing in his name but really belonging to B. S. STOWE, Trustee. This statement is not correct. Mr. Stowe did not qualify as Trustee in this matter until November 20, 1911 (Trans., p. 4). It appears that on December 22, 1911, just a month

later, a new issue of stock in the Shore Line Investment Company was made in Harvey's favor.

> "Mr. Harvey had no other stock appearing upon the books of the Company, beside the 546 shares, until June 1, 1909, on which date there was issued to him Certificate 80 for 10 shares. That was all the stock he had *until December 22, 1911*" (Trans., p. 95).

Respectfully submitted.

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EDWIN H. WILLIAMS,
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